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Supreme Court, U.S.
FILED

07 16 08 JUN 23 2008

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ANDRE SEYMOUR, ARTREZ N. SEYMOUR, KENT CLARK, ANDRE LAWRENCE, STACIA SMITH AND TROY LAWRENCE,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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JOINT PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Apprendi v. New Jersey* this Court held that the Sixth Amendment right to trial by jury requires that any fact that exposes a defendant to a greater potential sentence must be found by a jury. *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000) (where the jury must make "the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed"). In drug conspiracy cases under 21 U.S.C. § 841, the quantity of drugs is a fact that exposes a conspirator to a greater potential sentence. The circuit courts of appeals are divided as to whether the Sixth Amendment is violated when the quantity of drugs for a conspiracy as a whole is found beyond a reasonable doubt, but there is no concomitant finding of drug quantity that is attributable to or reasonably foreseeable by each individual conspirator. Thus, the question presented is:

> Whether the Sixth Amendment Right to trial by jury entitles an individual defendant in a drug conspiracy case to a jury finding regarding the quantity of drugs attributable to and/or reasonably foreseeable by that individual defendant.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioners, Andre Seymour, Artrez N. Seymour, Kent Clark, Andre Lawrence, Stacia Smith, and Troy Lawrence, pray that the Supreme Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at 519 F.3d 700 and is reprinted in the Appendix (App.) at 1a. The opinion of the U.S. District Court for the Northern District of Illinois is unreported and is reprinted in the Appendix at 32a.

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on March 24, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been

> previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

U.S. Const. amend. VI.

21 U.S.C. § 841 is reprinted in the Appendix at 123a.

21 U.S.C. § 846 provides:

"Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

STATEMENT OF THE CASE

This case raises important, recurring questions relating to the Sixth Amendment right to trial by jury; namely, the findings a jury must make in drug conspiracy cases under 21 U.S.C. § 841[1] in compliance with the Amendment, and the application of this Court's decisions in *Apprendi v. New Jersey* and its progeny. Currently, two appellate circuits – the Second and Fourth – require the jury to make defendant-specific findings regarding the quantity of drugs attributable to and/or reasonably foreseeable by each individual

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1 Throughout this Petition, all references to 21 U.S.C. §841 are abbreviated as "Section 841."

conspirator. Without such a defendant-specific quantity finding, these circuits conclude that the maximum prison sentence a conspirator can receive under Section 841 is twenty years. Five appellate circuits, however, conclude, as the Seventh Circuit concluded here, that a jury need only make a finding of drug quantity for the conspiracy as a whole and the judge can then determine, by a preponderance of the evidence, the quantity of drug attributable to and/or reasonably foreseeable by each individual conspirator. Thus, whereas in the Fourth and Second Circuits, an individual conspirator convicted under Section 841 could only be sentenced to a maximum of twenty years if the jury only made a conspiracy-wide drug quantity finding, a defendant in the Seventh Circuit, for example, could be sentenced to life in prison for the exact same offense with the exact same evidence and jury findings. Absent review by this Court, this conflict among the appellate circuits on a matter of Constitutional Law will continue.

A. THE DISTRICT COURT: INDICTMENT, CONVICTION, AND SENTENCING.

On July 16, 2002, 26 individuals were indicted in a 40-count indictment filed in the United States District Court for the Northern District of Illinois. Twenty-five of the indicted individuals were charged with conspiring to possess, with intent to distribute, and distributing, crack cocaine within one thousand feet of an elementary school, in violation of 21 U.S.C. §§ 841(a)(1) and 860(a). Seven defendants went to trial on September 16, 2003, and on December 18, 2003, "six Defendants were convicted of conspiring to

distribute and to possess with intent to distribute a controlled substance—cocaine and cocaine base—within one thousand feet of an elementary school, in violation of 21 U.S.C. §§ 841(a)(1), 860(a), and 846." *United States v. Seymour*, 519 F.3d 700, 708 (7th Cir. 2008) (attached at App. 1a-31a); (App. 13a.)

In finding Defendants Troy Lawrence, Andre Seymour, Kent Clark, Stacia Smith, Artrez Nyroby Seymour, and Andre Lawrence ("Petitioners") guilty, the jury filled out a verdict form that asked them to make a general determination as to whether a conspiracy to distribute or possess a certain amount of crack cocaine had been proven beyond a reasonable doubt. (App. 13a.) The verdict form did not ask the jury to determine the amount of crack cocaine attributable to or reasonably foreseeable by any particular Petitioner. (App. 13a.) The jury determined that the government had proved beyond a reasonable doubt that the conspiracy as a whole involved more than fifty grams of crack cocaine. (App. 13a-14a.)

At each of Petitioners' respective sentencing hearings, the District Court noted that the jury finding that the conspiracy involved more than fifty grams of crack cocaine carried a maximum statutory sentence of life imprisonment. (App. 14a.) The District Court determined that, consistent with the jury's quantity finding, the conspiracy involved more than 1.5 kilograms of cocaine base, and therefore all six Defendants had base offense levels of thirty-eight, before accounting for any enhancements, for sentencing purposes. (App. 14a.) For the conspiracy conviction alone, the Petitioners were sentenced as

follows: (1) Troy Lawrence: life imprisonment; (2) Andre Seymour: 324 months; (3) Nyroby Seymour: 300 months; (4) Kent Clark: 300 months; (5) Andre Lawrence: 300 months; and (6) Stacia Smith: 133 months. (App. 14a-15a.)

As part of their post-trial motions, Petitioners "requested that the district court sentence them under § 841(b)(1)(C), which governs distribution of less than five grams of cocaine base, instead of § 841(b)(1)(A), which governs distribution of more than fifty grams of cocaine base." (App. 14a.) In support of their motions, Petitioners argued that since the jury was not asked to find the quantity of drug attributable to and/or reasonably foreseeable by Petitioners individually, this Court's holdings in *Apprendi* and its progeny mandated sentencing under Section 841(b)(1)(C). (App. 32a, 35a.) The District Court denied these motions, and Petitioners were sentenced under § 841(b)(1)(A). (App. 14a.)

B. The Decision of the United States Court of Appeals for the Seventh Circuit.

On appeal to the United States Court of Appeals for the Seventh Circuit, Petitioners argued that the district court committed an *Apprendi* error when it sentenced Petitioners under Section 841(b)(1)(A) without the necessary jury findings regarding the quantity of drugs attributable to and/or reasonably foreseeable by Petitioners individually. (App. 15a.) The Seventh Circuit rejected Petitioners' arguments and affirmed their sentence. (App. 31a.) The Seventh Circuit

concluded: (1) a jury need only make a determination of the quantity of drug involved in the conspiracy as a whole; (2) that determination sets the maximum sentence to which any individual conspirator could be imprisoned; and (3) the judge is then free to determine, based on a preponderance of the evidence, the quantity of drug attributable to and/or reasonably foreseeable by each individual conspirator:

> [A] jury need not make a defendant-specific drug quantity determination for a conspiracy charge. Once a jury has determined that a conspiracy involved a type and quantity of drugs, and has found a particular defendant guilty of participating in the conspiracy, the jury has established the statutory maximum sentence that any one participant in the conspiracy may receive. Once the drug quantity and type for the conspiracy as a whole are determined by the jury, the judge may lawfully determine the drug quantity attributable to each defendant [by a preponderance of the evidence] and sentence him accordingly so long as that determination does not exceed the statutory maximum sentence determined by the jury. The rule, then, is that the government need only allege and prove to the jury the bare facts necessary to increase the statutory sentencing maximum for the conspiracy as a whole.

(App. 18a) (citations and internal quotations omitted). Petitioners now seek review of the Seventh Circuit's opinion and order.

REASONS FOR GRANTING THE PETITION

The decision below demonstrates the conflicting interpretations among the United States Courts of Appeals regarding what findings *Apprendi* and its progeny require a jury to make beyond a reasonable doubt in drug conspiracy cases brought under Section 841. The Circuits are divided over a vitally important and recurring issue of constitutional law: whether the Sixth Amendment right to trial by jury, as interpreted by this Court in *Apprendi* and its progeny, entitles a defendant in a federal drug conspiracy case to a jury finding beyond a reasonable doubt as to the quantity of drugs attributable to, or reasonably foreseeable by, that defendant. Because of the division among the circuits, prison sentences in otherwise identical drug conspiracy cases vary merely because of geography. Indeed, in light of the ever increasing number of federal drug prosecutions, the risk of conflicting sentences for identical offenses will only worsen. *See, e.g.*, United States Dept. of Justice, Office of Justice Programs, *Federal Criminal Justice Trends, 2003* (August 2006), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/fcjt03.pdf (noting a 5.7% annual increase in the number of federal drug prosecutions).

In *Apprendi*, this Court held that the jury must make "the assessment of facts that increase the prescribed range of penalties to which a criminal

defendant is exposed." 530 U.S. at 490. When the Court revisited its holding in *Apprendi*, it made it clear that *Apprendi* was not an isolated, narrowly defined decision. *See, e.g., United States v. Booker*, 543 U.S. 220 (2005); *Blakely v. Washington*, 542 U.S. 296 (2004); *Ring v. Arizona*, 536 U.S. 584 (2002). Rather, the Court has continually clarified the breadth of its original holding. Indeed, last year, in *Cunningham v. California*, 549 U.S. 270, 127 S. Ct. 856 (2007), this Court held that "any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt." *Id.* at 863-64. Thus, a defendant's Sixth Amendment right to trial by jury is implicated not only when a judge finds facts which cause a defendant's actual sentence to exceed that which the jury's factual findings would allow, but when a judge finds any facts which could theoretically change a defendant's potential maximum exposure.

I. *APPRENDI V. NEW JERSEY* AND ITS PROGENY REQUIRE THE JURY, NOT A JUDGE, TO MAKE DRUG QUANTITY FINDINGS.

Beginning with *Apprendi* and continuing with *Blakely* and *Booker*, the Court solidified a defendant's right to have a jury determine any fact that could expose a defendant to a harsher sentence. In *Apprendi*, the Court started with the principle that a criminal defendant is entitled to "a jury determination that [he] is guilty of every element of the crime with which he is charged." 530 U.S. at 477 (quoting *United States v. Gaudin*, 515 U.S. 506, 510 (1995)). The Court held that the Constitution

requires a jury to find, beyond a reasonable doubt, any fact that increases the penalty for a crime:

> Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury and proved beyond a reasonable doubt .... "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that ***increase the prescribed range of penalties to which a criminal defendant is exposed.*** It is equally clear that such facts must be established by proof beyond a reasonable doubt."

Apprendi, 530 U.S. at 490 (quoting *Jones v. United States*, 526 U.S. 227, 252-53 (1993)) (emphasis added).

In *Blakely*, the Court defined the phrase "statutory maximum" as set out in *Apprendi*, and in doing so, again buttressed the conclusion that *Apprendi* is violated whenever a judge finds any fact exposing a defendant to a greater potential sentence. 542 U.S. at 314 ("As *Apprendi* held, every defendant has the right to insist that the prosecutor prove to a jury all facts legally ***essential to the punishment***.") (emphasis added). Specifically, the Court determined that for purposes of *Apprendi*, a statutory maximum sentence is the maximum sentence a judge can impose without additional jury findings:

> the relevant statutory maximum is not the maximum sentence a judge may impose after finding additional facts, but ***the maximum he may impose without any additional findings.*** When a judge inflicts punishment that the jury's verdict alone does not allow, the jury has not found all the facts which the law makes essential to the punishment, and the judge exceeds his proper authority.

Blakely, 542 U.S. at 303-04 (emphasis added) (internal citation and quotations omitted).

In *Booker*, the Court applied *Apprendi* and *Blakely* in the context of a drug conspiracy, and found that the Federal Sentencing Guidelines violated the Sixth Amendment by requiring judges, based on their own drug quantity findings, to impose sentences in excess of the maximum authorized by jury fact-finding. 543 U.S. at 233-34. The Court held the Guidelines unconstitutional because when a judge makes a determination of a drug quantity not contemplated by the jury's verdict, the defendant automatically receives a sentence in excess of what he could have received based on the jury's findings alone. *Booker*, 543 U.S. at 235. In rejecting the Constitutionality of judicial findings, the Court stressed that its precedent guarantees a "defendant's right to have the jury find the existence of 'any particular fact' that the law makes essential to his punishment" and that this right was "implicated whenever a judge seeks to impose a sentence that is not solely based on 'facts reflected in the jury verdict

or admitted by the defendant.'" *Booker*, 543 U.S. at 230 (quoting *Blakely*, 542 U.S. at 301, 303).

Finally, in January of last year, the Court, in *Cunningham v. California*, continued to clarify the underpinnings of *Apprendi*. In reviewing the precedent on the Sixth Amendment right to trial by jury, the Court found the existence of a Sixth Amendment violation when a judge finds facts that increase a defendant's ***potential sentence*** that are "neither inherent in the jury's verdict nor embraced by the defendant's plea, and [ ] need only be established by a preponderance of the evidence, not beyond a reasonable doubt." *Cunningham*, 549 U.S. at __, 127 S. Ct. at 860.

In summarizing the decisions regarding the right to trial by jury, the Court found that *Apprendi* created a bright-line rule regarding the role of juries and judges in criminal prosecutions. *Id.* at __, 127 S. Ct. at 869 ("Asking whether a defendant's basic jury-trial right is preserved, though some facts essential to punishment are reserved for determination by the judge, ... is the very inquiry *Apprendi*'s bright-line rule was designed to exclude.") (internal quotations omitted). Thus, the Court concluded that "under the Sixth Amendment, ***any fact that exposes a defendant to a greater potential sentence*** must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." *Id.* at __, 127 S. Ct. at 863-64 (emphasis added).

II. THE CIRCUIT COURTS OF APPEALS ARE DIVIDED OVER WHETHER THE JURY MUST MAKE DEFENDANT-SPECIFIC DRUG QUANTITY FINDINGS IN FEDERAL DRUG CONSPIRACY CASES UNDER 21 U.S.C. § 841.

Section 841(b)(1) contains three autonomous subsections, each of which provides for an independent sentencing range, with a distinct maximum sentence exclusively dependent on the amount of narcotics attributed to a defendant. A defendant convicted under this statute faces a maximum sentence of life in prison if he or she could have reasonably foreseen fifty grams or more of cocaine base, 21 U.S.C. § 841(b)(1)(A), while the maximum sentence would be reduced to forty years if he or she was found to have only reasonably foreseen five to fifty grams of cocaine base. *Id.* § 841(b)(1)(B). Finally, if the amount reasonably foreseen was less than five grams of cocaine base, including those instances when there was no finding regarding the amount attributable to a defendant, a defendant's statutory maximum is twenty years. *Id.* § 841(b)(1)(C).

SECTION	AMOUNT	MAXIMUM POTENTIAL EXPOSURE
841 (b)(1)(A)	≥ 50 grams	Life
841 (b)(1)(B)	5-50 grams	40 years
841 (b)(1)(C)	< 5 grams	20 years

Thus, following *Cunningham*, because the amount of narcotics is "[a] fact that exposes a defendant to a greater potential sentence, [it] must

be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of the evidence." *Cunningham*, 549 U.S. at __, 127 S. Ct. at 863-64. The Seventh Circuit itself agrees that in a single-defendant prosecution, the drug quantity distributed by that defendant must be found by the jury beyond a reasonable doubt or the defendant's sentence is limited to a maximum of twenty years under Section 841(b)(1)(C). *See United States v. Flagg*, 481 F.3d 946, 950 (7th Cir. 2007) ("Under today's law, failure to meet the *Apprendi* rule results in limiting a sentence to the statutory maximum in § 841(b)(1)(C).") The rule should not apply differently in multiple defendant cases.

To be sure, in the context of a conspiracy to distribute narcotics, this Court's precedent makes clear that a defendant is not *per se* responsible for all of the narcotics distributed, or attempted to be distributed, by the conspiracy. *See Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946). The Fourth Circuit has recognized that "*Pinkerton* principles should be used to determine, for sentencing purposes, the amount of narcotics attributable to any one individual in a conspiracy[.]" *United States v. Collins*, 415 F.3d 304, 314 (4th Cir. 2005). *Cunningham*, therefore, makes clear that, to the extent a defendant is being sentenced for "the accountability of each co-conspirator for each object offense and the quantity of narcotics involved in each object offense using the principles of *Pinkerton*," *Collins*, 415 F.3d at 314, that amount "must be found by a jury, not a judge, and established beyond a reasonable doubt, not merely by a preponderance of

the evidence." *Cunningham*, 549 U.S. at __, 127 S. Ct. at 863-64.

A. THE SECOND AND FOURTH CIRCUITS INTERPRET *APPRENDI* TO REQUIRE DEFENDANT-SPECIFIC FINDINGS.

In contrast to the Seventh Circuit's holding here, the Second and Fourth Circuits require juries to make defendant-specific drug quantity determinations to set the statutory maximum sentences that particular conspirators may receive under Section 841. *See United States v. Brooks*, 524 F.3d 548, 557-58 (4th Cir. 2008) (holding that "the trial court erred in declining the request that it give an instruction requiring the jury to make the essential threshold determination of drug quantity, and thus establish the § 841(b) penalty range for each individual conspiracy defendant" where the jury "determined only the amount of crack attributable to the 'conspiracy as a whole'"); *United States v. Foster*, 507 F.3d 233, 250 (4th Cir. 2007) (same); *United States v. Adams*, 448 F.3d 492, 499-500 (2d Cir. 2006) (determining that defendant's claim that he knew of and agreed only to marijuana conspiracy did not provide sufficient factual basis for plea of guilty to cocaine conspiracy, where "[n]either the plea agreement, the indictment, nor a combination of the two provide[d] a factual basis for the quantity element of the aggravated offense under Section 841"); *United States v. Gonzalez*, 420 F.3d 111, 125-128 (2d Cir. 2005) ("[The defendant] could not be convicted of the charged § 841(b)(1)(A) conspiracy, or sentenced pursuant to the increased penalty ranges provided in that subsection, unless a jury found or

[defendant] himself admitted the specified drug quantity element"); *Collins*, 415 F.3d at 313-14 (holding that where the jury is not instructed that they "must determine what amount of cocaine base was attributable to the defendant using *Pinkerton* principles[ ], ... the district court's sentence, which was based on the 10 year minimum set forth in § 841(b)(1)(A), could not stand."); *see also United States v. Munson*, 181 Fed. App'x. 368, 369, Nos. 04-4288, 04-5015, 2006 WL 1344598, at *1 (4th Cir. May 17, 2006) (reaffirming *Collins*).

This framework of law harmonizes the fundamental tenet of conspiracy law that conspirators are liable only for the acts of the conspiracy that are within the scope of their criminal agreement, and this Court's instruction that, under the Sixth Amendment, any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt. *See, e.g., Pinkerton,* 328 U.S. at 647-48; *see also Cunningham*, 549 U.S. at __, 127 S. Ct. at 863-64.

The Fourth Circuit's decision in *Collins* provides an excellent example of why defendant-specific drug quantity findings are consistent with the Sixth Amendment. In *Collins*, the Fourth Circuit acknowledged that prior to *Apprendi* it had held that "it was the district court that determined, under a preponderance of the evidence standard, the quantity of narcotics attributable to a defendant" for the purposes of setting the specific threshold drug quantities under Section 841(b). *Collins*, 415 F.3d at 313 (citation omitted). However, the court found that

Apprendi and its progeny altered the Fourth Circuit's prior holdings by "effectively replacing the words 'a district court' with 'the jury' and requiring proof beyond a reasonable doubt." *Id.* at 314. The court also found that the reasonable foreseeability principle of conspiracy liability remained intact, but instead of applying those principles itself, the district court should now instruct the jury on how to apply those principles to its reasonable foreseeability determinations. *Id.* at 314.

Similarly, the Second Circuit held that if "a defendant is convicted only on a lesser unquantified drug charge, he must be sentenced pursuant to 841 (b)(1)(C)." *Gonzalez*, 420 F.3d at 131. Indeed, the Second Circuit also stated that a fact such as drug quantity "unquestionably increases the 'range of penalties to which a criminal defendant is exposed'" and thus is subject to the same analysis espoused by the Fourth Circuit. *Id.; see also Adams*, 448 F.3d at 500 (where sentencing under Section (A) must include a defendant reasonably foreseeing the type and quantity of the substance, in addition to the existence of the conspiracy and a defendant's willingness to join it).

Thus, the Second and Fourth Circuits have recognized the functional and constitutional problems with the conspiracy-wide approach to drug sentencing and have concluded this Court's

precedent requires individualized findings of drug quantity in cases involving Section 841.[2]

B. THE FIRST, THIRD FIFTH, SEVENTH AND TENTH CIRCUITS APPROVE OF CONSPIRACY-WIDE FINDINGS.

In contrast, to the Second and Fourth Circuits, the First, Third, Fifth, Seventh, and Tenth Circuits merely require juries in drug conspiracy cases to find the quantity of drugs attributable to the conspiracy as a whole, without regard to an individual defendant's role or involvement in the conspiracy. Under this precedent, once the conspiracy-wide drug quantity finding is made, the statutory maximum sentence for all convicted defendants is set. The district judge may then make defendant-specific drug quantity determinations by a preponderance of the evidence so long as no convicted defendant receives a sentence that exceeds the statutory maximum sentence as set by the jury.

The rule allowing conspiracy-wide jury findings to establish the statutory maximum sentence for an individual conspirator has its roots in the Court's pre-*Apprendi* decision in *Edwards v. United States*, 523 U.S. 511 (1998). In *Edwards*, a jury returned a general verdict that found the

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[2] The Court of Appeals for the District of Columbia has indicated that it agrees with the approach of the Second and Fourth Circuits. *See, e.g., United States v. Graham*, 317 F.3d 262, 273-74 (D.C. Cir. 2003) (where *Apprendi* violation may have occurred if Defendant received longer sentence without jury determination of amount of drugs attributable to individual).

defendants guilty of conspiracy to distribute "measurable amounts" of cocaine ***or*** crack; however, they were sentenced based on a bench determination that the conspiracy involved both cocaine ***and*** crack *Id.* at 513-14. Relying exclusively on the power provided under the Sentencing Guidelines, the Court held that a judge was able to "determine both the amount and the kind of 'controlled substances' for which a defendant should be held accountable-and then to impose a sentence that varies depending on those findings." *Id.*

The First Circuit first considered *Edwards* in a drug conspiracy context in the wake of *Apprendi*. *See United States v. Derman*, 298 F.3d 34 (1st Cir. 2002). Decided two years before both *Blakely* and *Booker*, the court in *Derman* expanded the holding from *Edwards*, by concluding that:

> as long as (1) the jury finds beyond a reasonable doubt that the defendant participated in a conspiracy, and (2) the Court sentences him with the statutory maximum applicable to that conspiracy, the court may "determine both the amount and the kind of 'controlled substances' for which [the] defendant should be held accountable · and then ... impose a sentence that varies depending upon amount and kind."

298 F.3d at 42.[3]

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[3] The First Circuit itself questioned the viability of the *Derman* approach to conspiracies involving more than a few conspirators

In *United States v. Turner*, the Fifth Circuit adopted *Derman's* holding and approved the use of conspiracy-wide jury findings for purposes of sentencing individual conspirators. 319 F.3d 716, 722-23 (5th Cir. 2003) ("Applying the *Derman* rule to this case, the Government's burden was to prove the existence of a conspiracy, Turner's involvement in it, and the requisite drug quantity (here, more than five kilograms) involved in the conspiracy beyond a reasonable doubt.").

The Seventh Circuit was the next appellate court to adopt the *Derman* and *Turner* conspiracy-wide approach, followed by the Third and Tenth Circuits. *See United States v. Knight*, 342 F.3d 697, 710 (7th Cir. 2003) ("[I]n [] drug conspiracy cases, the jury should determine the existence *vel non* of the conspiracy as well as any acts about the conspiracy that will increase the possible penalty for the crime of conviction beyond the default statutory maximum." (citing *Derman*, 298 F.2d at 43 and *Turner*, 319 F.3d at 722-23)); *see also United States v. Phillips*, 349 F.3d 138, 142-43 (3d Cir. 2003), *vacated on other grounds, Barbour v. United States*, 543 U.S. 1102 (2005) ("We find the analyses of *Derman*, *Turner*, and *Knight* persuasive. In drug conspiracy cases, *Apprendi* requires the jury to find only the drug type and quantity element as to the conspiracy as a whole, and not the drug type and quantity

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in *United States v. Nelson-Rodriguez*, 319 F.3d 12, 46-47 (1st Cir. 2003) (noting that *Derman's* "simple approach may break down for more complex conspiracies involving multiple transactions of different amounts of drugs imported at different times, with a shifting cast of actors").

attributable to each co-conspirator."); *United States v. Stiger*, 413 F.3d 1185, 1195 (10th Cir. 2005) ("We agree with the reasoning of our sister circuits that *Apprendi* requires the jury only to set the 'maximum sentence ([i.e., the] ceiling)' under which each coconspirator's sentence must fall." (citing *Knight*, 342 F.3d at 711)).

These circuits reason that this framework satisfies the Sixth Amendment, as interpreted by *Apprendi* and its progeny, because the jury, and not the judge, has ostensibly set the maximum sentence each defendant may receive. *See, e.g., Stiger*, 413 F.3d at 1192 ("Because the subsequent attribution of drug amounts to individual coconspirators cannot increase their maximum sentence, 'the judge lawfully may determine the drug quantity attributable to that defendant and sentence him accordingly (so long as the sentence falls within the statutory maximum made applicable by the jury's conspiracy-wide drug quantity determination)'.").

However, without defendant-specific drug quantity findings, a defendant sentenced in the Second or Fourth Circuits could only be sentenced under Section 841(b)(1)(C), regardless of the quantity of drugs involved in the conspiracy as a whole. In the other circuits, however, the maximum sentence for anybody convicted of conspiring to distribute more than fifty grams of crack cocaine is life in prison. Indeed, by allowing a conspiracy-wide finding to take the place of a defendant-specific drug quantity finding, the circuits have effectively created a zero-to-life sentencing scheme for any conspiracy involving more than fifty grams of crack cocaine. In

such a situation, the conspiracy-wide finding would subject a defendant to a maximum potential exposure of life in prison, but the district judge would be free to sentence the defendant to something less based on the judge's own findings made by a preponderance of the evidence. The Court should resolve this conflict to remove the arbitrarily unfair sentences: if Petitioners had committed these crimes in New York City, the maximum sentence each of them could have received would have been twenty-six years, but because they happened to live in Chicago, and the crimes were committed there, they faced substantially higher sentences.

III. THIS CASE SQUARELY PRESENTS THE CONFLICT.

In this case, the jury found each Petitioner guilty of a conspiracy that involved more than fifty grams of crack cocaine. However, the jury did not make, and was not asked to make, any individualized findings of drug quantity. As such, when the District Judge, not the jury, made the quantity determination necessary to sentence each Petitioner under the most severe subsection of the independently graduated sentences in Section 841, Petitioners' rights to a trial by jury, as established in the Sixth Amendment, were violated.

Despite Petitioners' motions for re-sentencing under Section 841(b)(1)(C) based on the lack of any jury finding on the amount of narcotics that was reasonably foreseeable to each individual Petitioner, the District Court sentenced Petitioners under Section 841(b)(1)(A). (App. 32a-122a.) In so doing,

the District Court limited its inquiry to *Edwards*, *Harris v. United States*, 536 U.S. 545 (2002) and Seventh Circuit precedent allowing conspiracy-wide findings to be imputed to individual conspirators for sentencing purposes, without the defendant-specific jury findings mandated under *Apprendi*. (App. 35a-37a.) The Seventh Circuit affirmed, exacerbating the conflict that exists in the circuits over whether the Sixth Amendment permits sentencing based on a single conspiracy-wide drug quantity finding or whether defendant-specific findings are also required for sentencing.

Under the conspiracy-wide approach, whenever the aggregate amount involved in the conspiracy as a whole falls within the amounts in Section 841(b)(1)(A), a conspiracy involving multiple defendants will, functionally, result in all Defendants being sentenced under the same section of Section 841(b)(1), even if some defendants were minor participants in the conspiracy. This forecloses consideration that some conspirators are more involved, more knowledgeable, and thus more culpable than others. This result is not the rule intended under *Apprendi* and *Cunningham*, and does not fit within established principles of conspirator liability. *Pinkerton*, 328 U.S. at 647-48 ("A different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement."); *Collins*, 415 F.3d at 313-14. Such impermissible foreclosure is

precisely the reason the Fourth Circuit requires defendant-specific findings:

> [R]ather than the district court applying *Pinkerton* principles when determining the appropriate sentence under § 841(b), that same court must instead instruct a jury to use *Pinkerton* principles when making the same determination. This is what the district court failed to do.
>
> By failing to instruct the jury in a manner consistent with our holding in *Irvin* (i.e. that, for purposes of setting a specific threshold drug quantity under § 841(b), the jury must determine what amount of cocaine base was attributable to Collins using *Pinkerton* principles), the district court's sentence effectively attributed to Collins, an individual member of the conspiracy, the quantity of cocaine base distributed by the entire conspiracy. Because the district court adopted the jury's drug quantity determination in its application of the sentencing guidelines, the error affected both the threshold statutory range under § 841(b) and the district court's application of the guidelines. For these reasons, the district court's sentence, which was based on the 10 year minimum set forth in § 841(b)(1)(A), cannot stand.

Collins, 415 F.3d at 314.

Similarly, the application of judicial discretion in the conspiracy-wide approach (as opposed to a jury determination of individual amounts) exposes defendants to the possibility of sentences beyond the individual statutory maximums. In a case such as this, involving a conspiracy charged as involving over fifty grams, the conspiracy-wide approach provides that the total conspiracy amount determines the maximum sentence for each defendant, which in this case was life imprisonment. 21 U.S.C. 841(b)(1)(A). According to the conspiracy-wide approach, the judge may then determine the drug quantity attributable to each defendant to create a "floor," and may then sentence the defendant within that range. *See, e.g.*, *Knight*, 342 F.3d at 711. But this approach takes all factors relating to sentencing away from the jury and gives district courts virtually unlimited control over sentencing issues. For example, in cases where either a defendant admits to an amount of less than 5 grams in a plea agreement, or a judge determines that an amount of less than 5 grams was attributable to an individual defendant, the judge has created a floor of zero years, a ceiling of life in prison, and, according to the conspiracy-wide approach, has the discretion to choose any sentence in between.

Aside from the illogical nature of a "zero to life" sentencing scheme and range, a judge would thus be free to sentence such a defendant to some amount over twenty years, even though the maximum under Section 841(b)(1)(C) is twenty years. Under the conspiracy-wide approach, this is acceptable because the statutory maximum is life, and so the fact that the sentence exceeded twenty years would be irrelevant for Sixth Amendment

purposes. *See Derman*, 298 F.3d at 43 (a judge's sentence is acceptable "so long as the sentence falls within the statutory maximum made applicable by the jury's *conspiracy-wide drug quantity determination*") (emphasis added). The Second Circuit relied on this incongruity to find that the Sixth Amendment required jury findings for the amount reasonably foreseeable to an individual defendant under Section 841:

> [I]f we were to adopt the position [that the judge may find the amount reasonably foreseeable to a defendant, which the] government urges on this appeal its ability to secure guilty pleas from drug couriers and low-level participants in large-scale conspiracies might well be affected because a preponderance finding as to a statutory drug quantity would then require a district court to impose § 841(b)(1)(A) or-(b)(1)(B) mandatory minimum sentences in all § 841 cases, even when defendants pleaded guilty to lesser unquantified drug offenses.

Gonzalez, 420 F.3d at 127 n.13; *see also Collins*, 415 F.3d at 314 (the error in requiring the jury to make only a conspiracy-wide drug quantity finding affects "both the threshold statutory range under § 841(b) and the district court's application of the guidelines.").

The Court in *Blakely* presaged these issues and warned against a judicial system that gives judges the power to make such drastic changes in sentences and subjects defendants to potentially

inconsistent sentences. *See Blakely*, 542 U.S. at 307-08 (discussing the "subjectivity" of a system that enables such fluctuations); *see also Apprendi,* 530 U.S. at 484 (warning of different punishments under similar circumstances and the consequent "loss of liberty"). In particular, the *Blakely* court noted the fallacies of a "manipulable standard" that produced factual results akin to those mentioned here. *Blakely*, 542 U.S. at 307-08 (where pleas to lesser charges did not always result in lesser sentences).

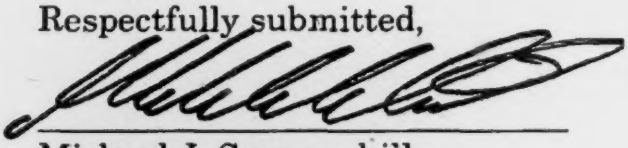
Ironically, the First Circuit – the very circuit that created the conspiracy-wide approach with its decision in *Derman* – was similarly prescient in *United States v. Nelson-Rodriguez* when it predicted that the *Derman* approach would "break down for more complex conspiracies" and thus suggested "a foreseeability test of some kind – attributing to each defendant the amount that the individual agreed upon, actually handled, and reasonably could have foreseen that others would handle." *Nelson-Rodriguez*, 319 F.3d at 46.

The jury's finding as to the conspiracy as a whole cannot constitutionally serve as the basis to determine any individual defendant's sentencing range.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX - PART A

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 05-3904, 05-3944, 05-3946, 05-3947, 05-4284, 06-2779

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

ANDRE SEYMOUR, ARTREZ N. SEYMOUR, KENT CLARK, ANDRE LAWRENCE, STACIA SMITH AND TROY LAWRENCE,

Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 02 CR 200—**Wayne R. Andersen,** *Judge.*

ARGUED JANUARY 18, 2008—DECIDED MARCH 24, 2008

Before BAUER, FLAUM, and SYKES, *Circuit Judges.*

BAUER, *Circuit Judge.*

Defendants-Appellants Andre Seymour, Artrez Nyroby Seymour ("Nyroby Seymour"), Kent Clark, Andre Lawrence, Stacia Smith, and Troy Lawrence (collectively, the "Defendants") appeal their respective sentences, claiming that their Sixth Amendment rights were violated when the district court sentenced all Defendants under 21 U.S.C. § 841(b)(1)(A) without having the jury make individualized findings regarding the quantities of drugs reasonably foreseeable to each defendant. Defendant Stacia Smith also asserts that the district court erred by not suppressing a gun found in Smith's possession during a January 2002 traffic stop, and that the district court abused its discretion when it denied her motion for a mistrial on the gun-related charge. In addition, Smith contends that there was insufficient evidence to support her conviction on the gun-related charge. Defendant Andre Lawrence also appeals his conviction on the gun-related charge, claiming the evidence was insufficient to support his conviction. For the following reasons, we affirm.

I. Background

All six Defendants were convicted, amongst numerous other charges, for conspiring to knowingly and intentionally possess with intent to distribute fifty grams or more of cocaine base, commonly known as "crack," within one thousand feet of an elementary school, in violation of 21 U.S.C. §§ 841(a)(1) and 860(a). Defendants Smith and Andre Lawrence were also convicted of knowingly possessing a firearm in

furtherance of drug trafficking, in violation of 18 U.S.C. § 924(c).

A. Drug Trafficking Operations

From the early 1990s until March of 2002, the Defendants were involved in a crack trafficking organization ("the Organization") in Chicago Heights, Illinois. The Organization initially sold crack in an area known as Wentworth Gardens. While at Wentworth Gardens, the Organization sold crack twenty-four hours a day, seven days a week. During the Wentworth Gardens era, defendants Troy Lawrence, Kent Clark, Stacia Smith, and Nyroby Seymour were among those working for the Organization.

In the late 1990s, the buildings around Wentworth Gardens were condemned and torn down. The Organization then moved to Claude Court, a different area in Chicago Heights that was surrounded by public housing. The Claude Court drug sales location was less than one thousand feet from an elementary school. The Organization was the only group selling crack in the Claude Court area. During the Claude Court era, defendants Andre Lawrence and Andre Seymour joined the Organization; Nyroby Seymour, Troy Lawrence, Kent Clark, and Stacia Smith remained members.

After the relocation, the basic structure of the Organization remained the same: Troy Lawrence was the leader and was responsible for buying the powder cocaine from his suppliers. He stored the cocaine at one of the Organization's stash houses,

which were the residences of Organization members. The cocaine was cooked into crack at the stash houses. Once the crack was prepared, other members of the Organization, referred to as "baggers," bagged the crack into small plastic bags, then fifty of the little bags were placed into a larger bag, called a "fifty pack."

After the crack was packaged into fifty packs, a member of the Organization referred to as a "runner" would bring the crack to the sales area—either Wentworth Gardens or Claude Court, depending on the time frame—and deliver it to another member, called the "shift runner" or "shift supervisor." The runner would also pick up drug sale proceeds from the shift supervisor. The shift supervisors were the managers of the sales area. When the area was running low on crack, the shift supervisors would make calls to other members of the Organization to have runners deliver more. After receiving the crack from the runner, shift supervisors gave it to a member of the Organization referred to as a "packman." The packman was responsible for the actual drug-money exchange with the customer.

The Organization also had members that were assigned to security to monitor the drug sales area, watching for law enforcement or anyone looking to rob a member of the Organization. Members on security assignment, as well as other members of the Organization, often carried guns for protection. Members of the Organization also drove cars with hidden "trap compartments," where they could conceal guns and drugs.

B. Organization Drug Orders and Stash Houses

One of Troy Lawrence's cocaine suppliers, Mark Connor, testified that he sold powder and crack cocaine to Troy Lawrence on and off from 1997 to March 2002. When Troy was unavailable, Connor would call Andre Lawrence, Troy's cousin. At first, Connor sold powder cocaine to Troy Lawrence once or twice a week in 4.5 ounce quantities, which Troy then cooked into crack. As time went on, Troy bought larger quantities of cocaine, including deals for half and full kilograms. Sometime in 1997, Connor cooked up a half kilogram of cocaine for Troy Lawrence after Troy questioned the quality of the cocaine Connor was selling. From early 2000 to November of 2001, Connor heard from Troy Lawrence once or twice a week for a couple of weeks, but then would not hear from him for a few months at a time. During November and December 2001, Troy bought cocaine from Connor more frequently and in greater quantities, ranging from one to three kilograms per transaction.

Troy stored the cocaine at the Organization's stash houses. Smith's home in Lynwood, Illinois, a Chicago apartment referred to as "the Hideout," and Andre Lawrence's home in Chicago were Organization stash houses. Troy and another of his cocaine suppliers, "JT," frequently discussed cocaine deals in Smith's apartment, and both Smith and Andre Lawrence knew that the Organization was storing cocaine in their homes. Connor delivered cocaine to Troy at a restaurant Troy owned, as well as at the Hideout and Andre Lawrence's house.

Between 1999 and 2002 alone, Connor delivered cocaine to Andre Lawrence's house an estimated twenty times. On approximately ten occasions while inside Andre Lawrence's house, Connor saw members of the Organization, including Andre Lawrence, bagging crack; on one occasion around Christmas of 2001, Connor saw Andre Lawrence take a gun out of the waistband of his pants and place it on a television inside the house. Connor also delivered cocaine to the Hideout on approximately five to ten occasions.

Levert Griffin, a member of the Organization who served as a runner at both Wentworth Gardens and Claude Court, testified that the Organization used Smith and Andre Lawrence's residences to store and bag crack. Griffin testified that he personally bagged crack with Andre Lawrence and other individuals inside Andre Lawrence's house and that on one occasion at Andre Lawrence's house, he saw a black handgun in the bedroom. Griffin also bagged crack at Smith's apartment with other individuals, including Andre Seymour, who worked as a shift supervisor for the Organization. From time to time and at Troy Lawrence's direction, Griffin purchased cocaine in approximately one kilogram quantities from suppliers JT and Connor. After purchasing the cocaine, Griffin brought the drugs to Smith's apartment, where Griffin knew drugs and drug proceeds were stored for the Organization.

In February of 2002, Troy Lawrence began paying for Organization member Tasha Deere's apartment in Chicago Heights. Deere's apartment was then used as a stash house, and members of the

Organization were there bagging crack every day. Troy brought crack to Deere's house, and at least five members of the Organization bagged it, including Andre Seymour and Troy. Deere's apartment was also used to stash drug proceeds, which Troy would pick up every two to three days.

C. Investigation of the Organization

Federal law enforcement began investigating the Organization's drug trafficking operations in July of 2000. Federal agents received court authorization to place wire taps on Griffin's and Troy Lawrence's telephones and to intercept text messages sent to pagers that belonged to Troy Lawrence and another Organization member named Cameron Wilson.

On various occasions, both the Chicago Heights Police and federal law enforcement agents seized drugs, drug proceeds and firearms from members of the Organization. For example, on July 5, 2000, the Chicago Heights Police officers seized forty-four small plastic bags containing crack dumped by Nyroby Seymour as he ran from police; after the chase, Nyroby was arrested (for the second time) for selling crack. Three days later, the Chicago Heights Police seized over $16,000 in cash from Troy Lawrence and his vehicle.

In October of 2000, law enforcement stopped Smith while she was driving her car near the Claude Court drug sales location. The officers had seen Smith take a white plastic grocery bag from a man in the drug sales area and drive away. While she drove away the officers noticed an unrestrained child in the

front seat and decided to stop her. The officers asked Smith (who was pregnant at the time) if she had any drugs or weapons in the car, to which she replied that she did not. The officers then asked for permission to search her purse and car, and Smith agreed.

While searching Smith's purse, the officers found a white plastic bag, which contained cash and slips of paper with names or aliases written on them. The officers seized the contents of the plastic bag, gave Smith a receipt for the items, and allowed Smith to leave. The evidence obtained from this traffic stop was later suppressed by the district court.

On December 26, 2001, runner Griffin was stopped by Chicago Heights Police officers and was found to have a gun and 10.9 grams of crack in a trap compartment of his car. On January 7, 2002, Kent Clark was stopped in Glenwood, Illinois, and officers found $7,539 wrapped in a rubber band inside a plastic bag, which he was transporting on behalf of Troy Lawrence and the Organization.

On January 24, 2002, officers searched Organization member Tasha Deere's vehicle and found 227 grams of crack in a trap compartment. That same day, officers stopped Smith in her car after intercepting a phone call from Troy Lawrence placed at 11:23 p.m. During that call, Troy Lawrence had instructed Smith to: "[G]et up. Put something on. Bring me that black box that's in your closet." Smith responded, "In my closet?" Troy Lawrence then said: "The black box. You know my know my thing in there. You hear me?" Smith replied, "Yeah, yeah,

yeah, yeah." Troy Lawrence then told her a second time to "[h]urry up." Moments later, officers stopped Stacia Smith and found a black box on the passenger seat with the words "Intra Tec" written on the outside of the box. Inside the box, officers found a loaded Intra Tec Model AB10 semi-automatic handgun.

On January 27, 2002, officers stopped Organization member Cameron Wilson, searched his vehicle and seized 211 grams of crack. On February 5, 2002, officers chased a vehicle driven by Organization supplier JT. During the chase, JT dumped approximately 4.4 kilograms of powder cocaine out of the window.

On March 5, 2002, officers searched Troy Lawrence's home in Hammond, Indiana. They found approximately $171,980 in cash, a money counter, two firearms, a flash suppressor, and firearm ammunition. That same day, officers searched three Organization stash houses. At the Hideout, officers found 496.4 grams of powder cocaine and various drug paraphernalia, including bags and seals. At Andre Lawrence's house, they found $5,535 in cash, two loaded guns (a Berretta and a Salvage), ammunition, a bullet proof vest, plastic bags, seals, and a safe containing another $4,000. The Salvage was found in the front room of the house, while the Berretta was found in the bedroom together with Andre Lawrence's wallet, bullet proof vest, ammunition for both guns, and the safe. At Tasha Deere's apartment, officers found 297.8 grams of cocaine base.

In addition to these seizures, law enforcement agents working in an undercover capacity between April and June of 2001 made seven controlled purchases of crack totaling 172.2 grams at the Organization's Claude Court drug sales area.

On July 16, 2002, the Defendants were indicted for conspiring to distribute and for possession with intent to distribute crack within one thousand feet of an elementary school (amongst other charges), and a jury trial ensued.

D. Trial Testimony

In addition to the law enforcement arrests, seizures, and undercover purchases of crack from members of the Organization, several witnesses at trial testified as to the amount of crack produced and sold by the Organization. As noted above, Organization drug supplier Connor testified as to his sales with the Organization. Runner Griffin also testified as to the Organization's operations. Griffin estimated that he delivered $4,000 to $10,000 worth of crack in a single eight-hour shift, which amounted to between 400 and 1000 bags of crack.

Green Sallis, a shift supervisor for the Organization at Wentworth Gardens and Claude Court, testified that in early 2002, he went to Tasha Deere's apartment, where Andre Lawrence (at Troy Lawrence's direction) gave him a softball-sized or football-sized piece of crack to be bagged. He also testified that Stacia Smith dropped off drugs or picked up money from him at Claude Court approximately twenty to thirty times.

Darren Stewart, a member of the Organization since 1996 and a packman from 1997 to 1999, testified that as a packman, he worked at Wentworth Gardens seven days a week, eight hours a day selling crack to customers. Kent Clark, a shift runner, supplied Stewart with the crack he sold. Stewart estimated that the Organization sold $20,000 worth of crack cocaine each day.

E. The Defendants' Roles in the Organization

Troy Lawrence was the leader of the Organization from its inception in the early 1990s until his arrest in 2002. Troy did most of the cocaine purchasing from the Organization's suppliers, including several deals for kilogram quantities of cocaine. He also handled all of the drug proceeds of the Organization's drug sales. Troy was aware of all the stash houses' operations and directed members of the Organization regarding operations for every shift. He held meetings to discuss the operations with everyone working in the drug sales areas, and made decisions regarding who was disciplined and how. Troy also determined what each member of the Organization was paid on a weekly basis and whether they would move up in the Organization.

Kent Clark worked for the Organization from 1996 until his arrest in January of 2002. Clark worked as a shift supervisor at Wentworth Gardens. When the Organization operated at Claude Court, Clark collected drug proceeds and transported money for the Organization.

Andre Seymour worked as a shift supervisor for the Organization for approximately two years at the Claude Court drug sales location. During his tenure, he received drugs and handled drug proceeds, bagged crack at the stash houses, participated in Organizational beatings to enforce discipline, attended Organization meetings, and obtained a gun for the Organization.

Nyroby Seymour began working for the Organization in 1998 and continued until at least 2001. At Wentworth Gardens and Claude Court, Nyroby worked as a packman and as security.

Smith, Troy Lawrence's girlfriend, worked for the Organization for an uncertain but undoubtedly long period of time. She worked for the Organization at both Wentworth Gardens and Claude Court as a runner and operated a stash house. Smith's home was used to conduct drug deals for wholesale quantities of cocaine, as well as to store those drugs and drug proceeds. Members of the Organization frequently bagged crack at Smith's house with several other members. According to Sallis, Smith delivered drugs or picked up money approximately one hundred times at Wentworth Gardens and approximately twenty to thirty times at Claude Court. Stewart also testified that Smith delivered drugs twice a week at Wentworth Gardens. Law enforcement intercepted a call from Troy Lawrence to Smith in which he told her to get $4,000 worth of crack, or roughly one hundred grams, to another member.

Andre Lawrence worked for the Organization from at least 1999 to 2002. He transported crack, received cocaine deliveries from Organization supplier Connor, and bagged crack. Most significantly, Andre Lawrence operated a stash house for the Organization out of his home. Sallis testified that Andre Lawrence was present at his home on numerous occasions when others cooked up and bagged crack there. On one occasion, Andre Lawrence gave Sallis a softball or football-sized piece of crack to be bagged. During the investigation, law enforcement intercepted several phone calls between members of the Organization, including a call between Sallis and Troy Lawrence in which Sallis was trying to pick up a "big mac," or approximately 500 grams of crack from Andre Lawrence's house.

F. The Verdict and Sentencing Hearings

On December 18, 2003, all six Defendants were convicted of conspiring to distribute and to possess with intent to distribute a controlled substance—cocaine and cocaine base—within one thousand feet of an elementary school, in violation of 21 U.S.C. §§ 841(a)(1), 860(a), and 846. In finding the Defendants guilty, the jury filled out a verdict form that asked them to make a general determination as to whether a conspiracy to distribute or possess a certain amount of cocaine base had been proven beyond a reasonable doubt. The verdict form did not ask the jury to determine the amount of cocaine base attributable to or reasonably foreseeable by any particular Defendant. The jury determined that the government had proved beyond a reasonable doubt

that the conspiracy involved more than fifty grams of cocaine base. The jury also found Smith and Andre Lawrence guilty of possessing a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c).

Amongst other post-trial motions, defendants Andre Seymour, Kent Clark, Andre Lawrence, and Nyroby Seymour requested that the district court sentence them under § 841(b)(1)(C), which governs distribution of less than five grams of cocaine base, instead of § 841(b)(1)(A), which governs distribution of more than fifty grams of cocaine base. The district court denied these and other post-trial motions, and all six Defendants were sentenced under § 841(b)(1)(A).

At each of the Defendants' respective sentencing hearings, the district court noted that the jury finding that the conspiracy involved more than fifty grams of cocaine base carried a maximum statutory sentence of life imprisonment. The district court determined that, consistent with the jury's quantity finding, the conspiracy involved more than 1.5 kilograms of cocaine base, and therefore all six Defendants had base offense levels of thirty-eight, before accounting for any enhancements, for sentencing purposes. Dependent upon a defendant's criminal history score, a base offense level of thirty-eight yields an advisory sentence under the Sentencing Guidelines ranging from 235 months to life imprisonment.

For the conspiracy conviction alone, the Defendants were sentenced as follows: (1) Troy

Lawrence to life imprisonment;[1] (2) Andre Seymour to 324 months' imprisonment; (3) Nyroby Seymour to 300 months' imprisonment; (4) Kent Clark to 300 months' imprisonment; (5) Andre Lawrence to 300 months' imprisonment; and (6) Stacia Smith to 133 months' imprisonment. For the gun-related charges, Smith and Andre Lawrence were sentenced to ten years and five years, respectively, to run consecutive to the other counts.

II. Discussion

All six Defendants argue that the district court committed an *Apprendi* violation when it failed to have the jury make defendant-specific drug quantity findings. Alternatively, Defendants contend that, even if a judge can make the defendant-specific quantity determination, the district court failed to do so. Defendants Smith and Andre Lawrence also seek to overturn their firearm convictions. We address each issue in turn.

A. Alleged *Apprendi* Error

Apprendi requires that a jury make "the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). The Defendants claim that the Supreme

---

[1] Because the jury had found Troy Lawrence guilty of eleven other charges in the indictment, and based on his having three prior felony drug convictions, the district court had no discretion with respect to Troy's sentence, and imposed the mandatory life sentence pursuant to 21 U.S.C. § 841(b)(1)(A).

Court's recent decision in *Cunningham v. California*, 127 S.Ct. 856 (2007), expanded the language of *Apprendi* and established that "any fact that exposes a defendant to a greater potential sentence must be found by a jury, not a judge, and established beyond a reasonable doubt." 127 S.Ct. at 863-64. Thus, the Defendants contend that their Sixth Amendment rights were violated when the district court judge, and not the jury, determined that 1.5 kilograms of crack were attributable to each defendant.

An *Apprendi* issue is subject to *de novo* review. *United States v. Chemetco, Inc.*, 274 F.3d 1154, 1158 (7th Cir. 2001). As Defendants correctly stated, *Apprendi* held that a jury must find beyond a reasonable doubt "any fact [other than a prior conviction] that increases the penalty for a crime beyond the prescribed statutory maximum." 530 U.S. at 490. The Supreme Court defined the phrase "statutory maximum" as set out in *Apprendi* as the maximum sentence a judge can impose without additional jury findings. *Blakely v. Washington*, 542 U.S. 296, 303-304 (2004).

Defendants are mistaken in their claim that the district court judge's finding that each defendant was responsible for 1.5 kilograms of crack in any way "increased" their potential maximum sentences. Any person who knowingly and intentionally distributes, or possesses with the intent to distribute fifty grams or more of a mixture or substance containing cocaine base has violated 21 U.S.C. § 841(a) and shall be sentenced under 21 U.S.C. § 841(b)(1)(A). *See* 21 U.S.C. § 841(b)(1)(A)(iii). The statutory maximum for a sentence pursuant to § 841(b)(1)(A) is life

imprisonment. Because the jury found the Defendants guilty of a conspiracy involving fifty grams or more of cocaine base, the drug quantity determination for the conspiracy was determined beyond a reasonable doubt by the jury, as required. *See United States v. Flagg*, 481 F.3d 946, 949-50 (7th Cir. 2007) ("[D]rug type and amount sufficient to trigger the higher statutory maximum of §§ 841(b)(1)(A) or (B) [must] be charged in the indictment and found by the jury beyond a reasonable doubt or admitted by the defendant.") (internal quotations omitted).

The district court's determination that each defendant was responsible for 1.5 kilograms or more of crack involved in the conspiracy placed the Defendants into the base offense level of thirty-eight, which has a maximum sentence of life imprisonment. The district court judge's determinations regarding the drug quantity attributable to each defendant did not increase the penalty for the crime beyond the statutory maximum, as determined by the jury, of life imprisonment; thus, no additional facts were found that affected the Defendants' potential maximum sentences. There was no *Apprendi* error and Defendants' reliance on *Cunningham* is misplaced. *See United States v. Martinez*, Nos. 06-2021, 06-2041, ___ F.3d ___, 2008 WL 553557, at *3 (7th Cir. Mar. 3, 2008) (finding drug conspiracy defendants' reliance on *Cunningham* regarding judicial fact-finding in applying the Guidelines misplaced now that the Guidelines are merely advisory).

Furthermore, a jury need not make a defendant-specific drug quantity determination for a conspiracy charge. *United States v. Tolliver*, 454 F.3d 660, 669 (7th Cir. 2006); *United States v. Knight*, 342 F.3d 697, 710 (7th Cir. 2003). Once a jury has determined that a conspiracy involved a type and quantity of drugs, and has found a particular defendant guilty of participating in the conspiracy, the jury has established the statutory maximum sentence that any one participant in the conspiracy may receive. *See Knight*, 342 F.3d at 710. Once the drug quantity and type for the conspiracy as a whole are determined by the jury, the judge may lawfully determine the drug quantity attributable to each defendant and sentence him accordingly so long as that determination does not exceed the statutory maximum sentence determined by the jury. *Id.*; *see also United States v. Hollins*, 498 F.3d 622, 629 (7th Cir. 2007) (post-*Cunningham* decision reviewing a district court's findings of fact regarding drug quantity for clear error). "The rule, then, is that the government need only allege and prove to the jury the bare facts necessary to increase the statutory sentencing maximum for the conspiracy as a whole." *Id.*; *see Edwards v. United States*, 523 U.S. 511, 513-14 (1998).

All that remains of Defendants' argument is whether the district court judge erred in attributing 1.5 kilograms of crack to each defendant. We review the district court's findings as to drug quantity for clear error. *Hollins*, 498 F.3d at 629; *United States v. Wilson*, 481 F.3d 475, 483 (7th Cir. 2007). For sentencing purposes, a criminal defendant convicted of a drug trafficking conspiracy is liable for the

reasonably foreseeable quantity of drugs sold by his or her co-conspirators. *See Wilson*, 481 F.3d at 483; *United States v. Olson*, 450 F.3d 655, 685 (7th Cir. 2006). Reasonable foreseeability is a factual determination and is reviewed for clear error. *Olson*, 450 F.3d at 685. The government's burden in attributing drug quantities to a particular defendant does not require that it show that the defendant was involved in or even had direct knowledge of any particular transaction. *Hollins*, 498 F.3d at 630. "[R]easonable foreseeability refers to the scope of the agreement that [a defendant] entered into when he joined the conspiracy, not merely to the drugs he may have known about." *Id.* (quoting *United States v. Flores*, 5 F.3d 1070, 1083 (7th Cir. 1993)); *see also Martinez*, ___ F.3d ___, 2008 WL 553557 at *4 ("'Reasonable foreseeability' is thus a qualification to holding one conspirator accountable for the conduct of others."). "[A]lthough evidence of drug quantity must be more than speculative . . . the sentencing guidelines permit *some* amount of reasoned 'speculation and reasonable estimation' by a sentencing court." *Id.* at 631 (quoting *United States v. Jarrett*, 133 F.3d 519, 530 (7th Cir. 1998) (citing U.S.S.G. § 2D1.1)) (emphasis in original).

The district court was presented with substantial evidence that at least 1.5 kilograms of crack were sold and foreseeable during the various Defendants' involvement with the Organization. First, the Organization ran a large-scale crack distribution from the early 1990s until 2002, selling crack to customers twenty-four hours a day, seven days a week, and employing approximately ten to fifteen people. Testimony from Organization

members Stewart and Griffin also demonstrated that 1.5 kilograms of crack was hardly the tip of the iceberg for the Organization. Stewart testified that the Organization sold approximately $20,000 worth of crack a day, and that the Organization made approximately $1,000 per ounce of crack. Based on Stewart's estimates, the Organization sold 1.5 kilograms of crack in less than three days of work. Similarly, Griffin testified that he delivered crack to shift supervisors two to four times a day, delivering $4,000 to $10,000 worth of crack. Using the most conservative measure of Griffin's estimate, he alone delivered 1.5 kilograms of crack in less than fourteen days of work.

Moreover, the government seized a substantial amount of crack from the Organization. In a single three-day period, law enforcement seized 227 grams of crack from Tasha Deere and 211 grams from Cameron Wilson. Undercover purchases also yielded 172.2 grams of crack.

As the government points out, these quantities and calculations are just snapshots of the Organization's massive drug trafficking operation. They also demonstrate that an individual need not be involved in the Organization for more than a couple of weeks to be a part of 1.5 kilograms of crack sales. Based on the Defendants' critical roles and long tenures with the Organization, each

defendant could reasonably foresee the involvement of 1.5 kilograms of crack in the Organization's drug trafficking operations.[2]

We briefly address the Defendants' individual involvement in the conspiracy in turn to determine if the district court clearly erred in attributing 1.5 kilograms of crack to each defendant. We need not trouble ourselves with Troy Lawrence's sentence; the jury found Troy Lawrence guilty beyond a reasonable doubt of possession with the intent to distribute fifty grams or more of cocaine base on two other charges of the indictment. Troy's argument that the district court improperly found 1.5 kilograms attributable to him individually is irrelevant, because the jury had already made a specific quantity finding as to him. Troy Lawrence's *Apprendi* argument has no merit.

Kent Clark and Andre Seymour were shift supervisors for the Organization for approximately eight years and two years, respectively. As testimony at trial explained, shift supervisors were aware of the amount of crack going into the sales area to each packman from the runners. Both took on additional roles in the Organization as well. Clark collected and transported drug proceeds, and Andre Seymour bagged crack for the Organization at the stash

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[2] Defendants also contend that allowing the judge to make an individualized quantity determination based on reasonable foreseeability creates possible sentencing ranges of "zero to life" in cases involving large conspiracies, such as this case, but very minor participants. As discussed herein, none of the Defendants even come close to qualifying as "minor participants," therefore we need not address these concerns.

houses. The evidence amply supported the district court's determination that 1.5 kilograms were attributable to both Clark and Andre Seymour.

Packman Nyroby Seymour also worked for the Organization for approximately three years. As a packman, Nyroby was at the sales location and had first-hand knowledge of the amount of crack being sold. Based on his tenure and role in the Organization, 1.5 kilograms of crack were also reasonably foreseeable to Nyroby Seymour.

Both Stacia Smith and Andre Lawrence operated stash houses out of their homes for several years. Organization member Sallis's testimony indicated that Smith delivered crack to the drug sales areas on approximately 120 occasions. In addition to running a stash house, Andre Lawrence received cocaine deliveries for Troy Lawrence and participated in bagging the crack at the stash houses. Law enforcement intercepted a phone call in which Sallis was trying to pick up a "big mac," or 500 grams of crack, from Andre Lawrence's house. Again, based on the conservative calculations supported by the evidence and testimony at trial discussed above, 1.5 kilograms of crack were certainly foreseeable to both Smith and Andre Lawrence.

There was overwhelming evidence at trial that demonstrated the day-to-day involvement over extended periods of time of the Defendants, such that each of them could easily foresee that the conspiracy involved 1.5 or more kilograms of cocaine base. *See Knight*, 342 F.3d at 712; *United States v. Patterson*, 241 F.3d 912, 914 (7th Cir. 2001) (per curiam).

Accordingly, we find no error in the district court's sentencing determinations.

We acknowledge that the district court did not explicitly determine that 1.5 kilograms of crack were reasonably foreseeable to the individual defendants. Instead, the district court began the sentencing hearings by concluding that the conspiracy undoubtedly involved at least 1.5 kilograms of crack, and that this was just a fraction of what was actually involved. But even if there was error in not attributing a defendant-specific finding on the charges in this case, it would have been harmless given the evidence presented at trial and discussed throughout this opinion. *See Knight*, 342 F.3d at 712 (holding that a failure to make defendant-specific drug quantity findings was harmless error, given that the full weight of the drugs involved in the conspiracy was easily attributable to each defendant, the large scale of the drug trafficking organization, the defendants' roles in the organization, and the evidence of drug quantity established at trial) (citing *Neder v. United States*, 527 U.S. 1, 10-11 (1999)). Where a defendant's drug quantity is not submitted to the jury, for purposes of determining whether the error was harmless, we focus on the amount of drugs possessed by the conspiracy. *Id.* at 711. We do this because each of the defendants was convicted of conspiring with the others to distribute drugs, and as a member of the conspiracy, each defendant is accountable for the acts of all other conspirators within the scope of that agreement. *Id.*

B. Stacia Smith's Firearm Conviction

Smith first asserts that the gun obtained during the January 2002 traffic stop should have been suppressed because the police lacked probable cause to conduct the search. Smith rests her argument on the district court's exclusion of the evidence obtained from the October 2000 stop, which Smith contends provided the only reasonable basis for law enforcement to suspect her involvement in the Organization's drug trafficking operations. Absent the October 2000 stop, Smith argues, the police lacked probable cause to make the January 2002 stop because Troy Lawrence's instruction to bring the "black box" to grandma's house could not give rise to any belief that the black box was (or contained) contraband. Smith asserts that Troy Lawrence's instructions would have reasonably been perceived to be merely a "domestic favor." Smith also moved for a mistrial on the firearm charge on the basis that the gun should have been suppressed.

On appeal of a denial of a motion to suppress, this Court reviews a district court's legal conclusions *de novo* and findings of fact for clear error. *United States v. Dowthard*, 500 F.3d 567, 568-69 (7th Cir. 2007); *United States v. Mendoza*, 438 F.3d 792, 795 (7th Cir. 2006). "[A] vehicle may be stopped and searched without a warrant if there is probable cause to believe the vehicle contains contraband or other evidence of illegal activity." *United States v. Navarro*, 90 F.3d 1245, 1252 (7th Cir. 1996). Probable cause exists where "under the totality of the circumstances, it is fairly probable that the car contains contraband or evidence." *United States v. Webb*, 83 F.3d 913, 916

(7th Cir. 1996). Evidence obtained in violation of an individual's Constitutional rights cannot be used against the individual. *See United States v. Fields*, 371 F.3d 910, 914 (7th Cir. 2004).

Smith fails to consider the totality of the circumstances surrounding the January 2002 stop. Although the district court mentioned the fact that Smith had been stopped in October of 2000 and was found to possess drug proceeds from the Organization's operations, it did not rely on this evidence in its probable cause determination in a way that would taint the January 2002 stop. Law enforcement had obtained a warrant to intercept phone calls from Troy Lawrence's phone and had intercepted numerous calls to Smith, including two calls from Troy Lawrence instructing her to bring drugs to Organization member Green Sallis. Throughout the phone taps, the conversations repeatedly used codes to communicate drug amounts, locations, and members' names. Based on these phone calls, police reasonably believed Smith to be a drug associate of Troy Lawrence and reasonably believed that "the black box" and "my thing" were code for contraband or illegal activity, and not merely a "domestic favor."

Furthermore, the law enforcement agent that stopped Smith that night testified that Smith was speeding. The gun was in plain view on the passenger seat of the car in the gun manufacturer's black case with name "Intra Tec" on the exterior of the box. Therefore, even if the police did not have probable cause based on the intercepted phone calls, the gun was properly admitted because the

police had probable cause to make a traffic stop and the gun case in plain view would still be properly seized. *Dowthard*, 500 F.3d at 569 ("An officer has probable cause for a traffic stop when she has an 'objectively reasonable' basis to believe a traffic law has been violated."); *United States v. Raney*, 342 F.3d 551, 558-59 (7th Cir. 2003) (finding that if an officer is lawfully present, sees an object in plain view, and the incriminating nature of the object is readily apparent, an object can properly be seized pursuant to the plain view doctrine). There is no dispute that speeding is a violation of Illinois law, and there is no argument made that a reasonable officer would not have thought that Smith was not actually speeding. Accordingly, the gun was properly seized and admitted into evidence.[3]

Because the district court properly denied Smith's motion to suppress the gun, the district court did not abuse its discretion in subsequently denying Smith's motion for a mistrial regarding the gun charge. *See United States v. Mannie*, 509 F.3d 851, 856 (7th Cir. 2007) (a district court's refusal to grant a mistrial is reviewed for abuse of discretion); *United States v. Miller*, 276 F.3d 370, 373 (7th Cir. 2002) (same).

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[3] For the first time at oral argument, the parties suggested that the threshold for the January 2002 traffic stop was reasonable suspicion, and not probable cause. Because we find that the January 2002 traffic stop was supported by probable cause established without consideration of the October 2000 traffic stop, we need not address whether the search and seizure was justified by reasonable suspicion. *See United States v. Scott*, No. 07-1914, ___ F.3d ___, 2008 WL 426390, at *3 (7th Cir. Feb. 19, 2008).

Having decided that the gun was properly admitted into evidence, we turn to Smith's assertion that there was insufficient evidence from which a rational trier of fact could determine, beyond a reasonable doubt, that she was guilty of possessing a gun in furtherance of the drug conspiracy. Specifically, Smith argues that the only evidence offered by the government to convict Smith of the gun-related charge was the recorded conversation between Smith and Troy Lawrence right before the law enforcement stopped her car and seized the gun. This evidence, Smith argues, does not demonstrate that Smith knowingly possessed the gun in furtherance of the drug conspiracy, as charged in the indictment.

The standard of review facing a defendant on her claim that the jury had insufficient evidence to convict is "a daunting one." *United States v. Hicks*, 368 F.3d 801, 804 (7th Cir. 2004). This Court's inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 804. This Court will not overturn a conviction based on insufficient evidence unless the record is devoid of evidence from which a reasonable jury could find guilt beyond a reasonable doubt. *United States v. Curtis*, 324 F.3d 501, 505 (7th Cir. 2003).

A reasonable jury could find that Smith knew she was transporting the gun, and based on the circumstances of Troy Lawrence's request for the gun, that it was to be used in the furtherance of the drug conspiracy. When Troy Lawrence requested the

"black box" in her closet that contained his "thing," and then said to Smith, "You know my know my thing in there," Smith responded, "Yeah, yeah, yeah, yeah." This response could reasonably be interpreted by the jury as evidence that she knew exactly what Troy Lawrence was asking for that night. Even if Smith did not know what was inside the case, the case itself would have told her. Smith transported the gun in its black case, which had the name of the gun manufacturer, Intra Tec, written clearly on the outside of it.

The evidence also supports the jury's finding that Smith possessed the gun "in furtherance" of the drug conspiracy. Evidence must specifically tie the weapon to the drug trafficking activity. *United States v. Duran*, 407 F.3d 828, 840 (7th Cir. 2005). Factors that can be useful in distinguishing between mere possession of a firearm and possession in furtherance of a drug conspiracy include: (1) the type of drug activity that is being conducted; (2) accessibility of the firearm; (3) the type of weapon possessed; (4) whether the weapon is stolen; (5) the status of the possession (legitimate or illegal); (6) whether the gun is loaded; (7) proximity to drugs or drug profits; and (8) the time and circumstances under which the gun is found. *Id.* at 840. "One legal theory that has been advanced and unanimously accepted, is that a possessed gun can forward a drug-trafficking offense by providing the dealer, his stash, or his territory with protection." *Id.*

Applying these factors to this case, the jury reasonably could have found that the weapon was possessed "in furtherance" of the drug trafficking

operation. Smith was a key player in the Organization's operations that trafficked huge amounts of crack for almost a decade. Smith's home was a stash house for the Organization, and Smith possessed the gun in the closet of her home prior to transporting it to Troy Lawrence, the Organization leader, and at his direction. The gun was loaded and easily accessible to Smith inside her car when it was seized. Moreover, Troy Lawrence called Smith and requested the gun after eleven o'clock at night. Troy also made it clear that he was in a hurry to get the gun. Finally, an intercepted call between Troy and an individual named Dante Lawrence just before midnight that night showed that the gun was being brought to Troy in Chicago Heights—the center of the Organization's drug trafficking operations. Therefore, a reasonable jury could have found that Smith possessed the gun in furtherance of the drug conspiracy.

C. Andre Lawrence's Firearm Conviction

Andre Lawrence also argues that there was insufficient evidence from which a rational trier of fact could determine, beyond a reasonable doubt, that he was guilty of possessing a gun in furtherance of the drug conspiracy.[4] We disagree.

Revisiting the factors enumerated above, the jury's determination that Andre Lawrence possessed the guns in furtherance of drug trafficking is amply

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[4] Andre Lawrence does not challenge the knowledge element of his § 924(c) conviction.

supported. Two guns were recovered from inside Andre Lawrence's house, which was used as a stash house for the Organization. The Berretta handgun was accessible, kept underneath the mattress of a bed. The Berretta was loaded and in the same room as a safe holding $4,000 in cash. The Salvage handgun was also loaded and accessible, concealed inside a couch in the front room of the house.

Moreover, the testimony elicited at trial supports the jury's finding that Andre Lawrence possessed the gun in furtherance of the drug conspiracy. Connor, one of the Organization's cocaine suppliers, testified that he saw Andre Lawrence with a gun in his waistband when he was at Andre Lawrence's house around Christmas of 2001. Connor said that Andre Lawrence removed the gun from his waistband and set the gun on the television while Connor and other Organization members were at his home bagging crack. Griffin, a runner for the Organization, also testified that he saw a handgun in Andre Lawrence's bedroom when he was bagging crack at Andre Lawrence's home. These two instances in which Andre Lawrence displayed a gun at an Organization stash house could reasonably be interpreted by the jury to be a message of protection of the drug conspiracy territory and its members. *See Duran*, 407 F.3d at 840-41 (rejecting sufficiency of the evidence challenge where gun was held in the conspiracy's headquarters for protection); *see also United States v. Castillo*, 406 F.3d 806, 814-18 (7th Cir. 2005). Accordingly, the evidence was sufficient to convict Andre Lawrence of possession of a firearm in furtherance of the drug conspiracy.

III. Conclusion

For the foregoing reasons, we affirm all six Defendants' sentences, as well as the district court's denial of Smith's motion to suppress and motion for mistrial. We also affirm the firearm convictions of Smith and Andre Lawrence.

APPENDIX – PART B

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
Plaintiff,	)	
v.	)	**No. 02 CR 200**
TROY LAWRENCE, *et al.*,	)	**Wayne R. Andersen**
Defendants	)	**District Judge**

MEMORANDUM, OPINION AND ORDER

This case is before the Court on the motion of Defendants Andre Seymour, Kent Clark, Andre Lawrence and Nyroby Seymour for sentencing under 21 U.S.C. 841(b)(1)(C). For the following reasons, the motion is denied.

BACKGROUND

Defendants were charged under 21 U.S.C. 841(b)(1) with participation in a narcotics conspiracy. 21 U.S.C. 841(b)(1) contains 3 separate penalty provisions: Subsection (A) governs distribution of

more than 50 grams of cocaine base; Subsection (B) governs distribution of between 5 and 50 grams of cocaine base; and Subsection (C) governs distribution of less than 5 grams of cocaine base.

Defendants were found guilty of narcotics conspiracy by a jury. The jury specifically found that the conspiracy as a whole involved more than 50 grams of cocaine base. However, there were no jury findings of any amount of drugs reasonably forseeable to any specific Defendant. Absent such a finding, Defendants claim that they should be sentenced under Subsection C, because jury findings required for Subsections A and B were not made. Under Subsection C, there is no statutory minimum and the applicable maximum is 20 years or 30 years if properly enhanced under § 851.

DISCUSSION

I. Mandatory Statutory Minimum Penalties

Defendants first argue that the jury should have found drug amounts for each specific Defendant and, therefore, determined the Defendants' mandatory minimum sentences. Defendants maintain that the Court is precluded from calculating drug amounts for purposes of determining each Defendant's mandatory minimum sentence. The Supreme Court, however, has held that a judge may find, by a preponderance of the evidence, factors that increase a defendant's statutory mandatory minimum sentence, as long as it does not exceed the statutory maximum penalty. *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). More

recently in *Harris v. United States*, 536 U.S. 545 (2002), the Supreme Court considered whether *McMillan* was still good law and concluded that it was. In *Harris*, the Supreme Court examined whether the facts supporting a statutory mandatory minimum sentence in 18 U.S.C. § 924(c) must be alleged in the indictment and found by a jury beyond a reasonable doubt. The court concluded that they did not. In so holding, the Court relied on the distinction between a fact that authorizes a maximum penalty, which would have been considered an element of an aggravated crime by the Framers, and facts that support a mandatory minimum penalty, which merely reduces the sentencing judge's discretion and does not interfere with the historical role of the jury. *Id.* at 557, 563-64. Therefore, the Court reaffirmed the holding of *McMillan* that the task of finding facts supporting a mandatory minimum sentence are within the purview of the sentencing judge.

Neither the Supreme Court's decision in *Blakely v. Washington*, 124 S.Ct. 2531 (2004) or in *United States v. Booker*, 125 S.Ct. 738 (2005), addressed statutory mandatory minimum penalties, nor did they purport to implicitly or explicitly overrule *Harris* and its progeny. Therefore, consistent with prior on-point Supreme Court and Seventh Circuit precedent, at sentencing, this Court must determine the amount of drugs reasonably foreseeable to each defendant and, after considering the now-advisory Sentencing Guidelines, impose a sentence that is equal to or higher than the corresponding mandatory minimum sentence prescribed in 21 U.S.C. § 841(b).

II. Statutory Maximum Penalties

With respect to the applicable statutory maximum penalty, Defendants ask this Court to hold that the jury needed to make defendant-specific findings of drug amounts in order to apply either of the enhanced statutory maximum penalties in 21 U.S.C. § 841(b). This proposition flies in the face of the case law, beginning with the Supreme Court's decision in *Edwards v. United States*, 523 U.S. 511 (1998), and continuing with every decision of a court of appeals to have interpreted *Edwards*.

In *Edwards*, the jury was instructed that it could convict a defendant in a joint powder cocaine/crack conspiracy if it found that the government had proven a particular defendant joined a conspiracy that involved either powder or crack. After conviction, the district court sentenced the defendants based upon the crack and powder cocaine for which it found each defendant responsible. The defendants argued on appeal that because the jury in that case returned a general verdict, the judge was constrained in the Sentencing Guidelines determinations and the sentences could be based on only powder cocaine. The Seventh Circuit disagreed, holding that the district court was correct in determining the drug amounts for both crack and powder cocaine at sentencing by a preponderance of the evidence, and the Supreme Court affirmed. The Supreme Court reasoned that as long as the sentence imposed was within the maximum penalty associated with the facts found by the jury as to the conspiracy as a whole, there was no error. *Id.* at 515.

Every Court of Appeals that has interpreted *Edwards* in light of *Apprendi* has held that, in order for the enhanced maximum penalties found in subparagraphs (A) and (B) of 841(b)(1) to apply, the jury need not make defendant-specific findings, but rather need only find the amount and type of drugs that were involved in the conspiracy charged - exactly what was done in this case. *See, e.g., United States v. Mercado Irizariy*, 404 F.3d 497, 504 (1st Cir. 2005)"); *United States v. Phillips*, 349 Fad 138, 141-43 (3rd Cir. 2003); *United States v. Knight*, 342 F.3d 697, 710 (7th Cir. 2003) ("We agree with the First Circuit that *Apprendi* did not overrule *Edwards* and that its holding does not require defendant-specific findings of drug type and quantity in drug-conspiracy cases."); *United States v. Turner*, 319 F.3d 716, 722-723 (5th Cir. 2003).

Neither the Supreme Court's decision in *Blakely* or *Booker* addressed the requisite findings for the imposition of statutory maximum penalties in a dug conspiracy case, and they neither implicitly nor explicitly overruled *Edwards* and its progeny. Therefore, because the jury in this case found that the conspiracy involved more than 50 grams of cocaine base, each Defendant convicted in this case faces the maximum penalty of life imprisonment pursuant to 21 U.S.C. § 84l(b)(1)(A).

CONCLUSION

The Supreme Court's decisions in *Blakely* and *Booker* did not change the legal landscape for the determination of maximum and mandatory minimum sentences under the federal drug laws.

The moving defendants each were convicted of Count One (the conspiracy) and the jury found that the conspiracy involved more than 50 grams of cocaine base. Therefore, each faces the penalties delineated in 21 U.S.C. § 841(b)(1)(A) - a maximum penalty of life imprisonment and a mandatory minimum sentence of twenty years' imprisonment (due to their prior convictions).

For the foregoing reasons, we deny the motion of Defendants Andre Seymour, Kent Clark, Andre Lawrence and Nyroby Seymour for sentencing under 21 U.S.C. § 841(b)(1)(C).

It is so ordered.

s/s
Wayne R. Andersen
United States District
Court Judge

Dated: September 8, 2005

APPENDIX – PART C

United States District Court
Northern District of Illinois

UNITED STATES OF AMERICA	
v.	**Case Number: 02-CR-200-1**
	Judge: Wayne R. Andersen
TROY LAWRENCE, SR.	
	Phillip Turner, Defendant's Attorney
	Bart Huff, AUSA

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

THERE WAS A:

jury verdict of guilty as to count(s) ONE (1), ELEVEN (11), SIXTEEN (16) through NINETEEN (19), TWENTY-ONE (21), TWENTY-THREE (23) through TWENTY-SEVEN (27), THIRTY-FIVE (35) through THIRTY-EIGHT (38) of the INDICTMENT.

Defendant was found **not guilty** as to count TWENTY-EIGHT (28).

THE DEFENDANT IS CONVICTED OF THE OFFENSES(S) OF:

Title & Section	Description of Offense	Date Offense Concluded	Count Number(s)
21:846	Narcotics Conspiracy	05/05/2002	ONE (1)
21:843(b)	Use of Telephone in Drug Conspiracy	Various dates	ELEVEN (11), SIXTEEN (16), TWENTY-ONE (21), TWENTY-THREE (23), TWENTY-SEVEN (27), THIRTY-SIX (36)

Title & Section	Description of Offense	Date Offense Concluded	Count Number(s)
21:841(a)(1)	Possess with intent to distribute cocaine & cocaine base	Various dates	SEVENTEEN (17), TWENTY-FOUR (24), THIRTY-FIVE (35), THIRTY-SEVEN (37), THIRTY-EIGHT (38)
18:924(c)(1)(A)	Using/carrying a firearm in relation to drug offense	Various dates	EIGHTEEN (18)
18:922(g)(1)	Unlawful possession of firearm after previous felony conviction	Various dates	NINETEEN (19), TWENTY-SIX (26)
18:924(c)(10(A)	Using/carrying a firearm in relation to drug offense	Various dates	TWENTY-FIVE (25)

The defendant is sentenced as provided in the following pages of this judgment.

IMPRISONMENT

IT IS THE JUDGMENT OF THIS COURT THAT:

the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **Life Imprisonment.**

As to Count ONE (1), SEVENTEEN (17), TWENTY-FOUR (24), THIRTY-FIVE (35), THIRTY-SEVEN (37), THIRTY-EIGHT (38), the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **Life**. As to Count ELEVEN (11), SIXTEEN (16), TWENTY-ONE (21), TWENTY-THREE (23), TWENTY-SEVEN (27), THIRTY-SIX (36), the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **FORTY-EIGHT (48) MONTHS** per count to run concurrent to all other counts, except count eighteen (18) and twenty-five (25). As to Count NINETEEN (19), TWENTY-SIX (26), the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **ONE HUNDRED TWENTY (120) MONTHS** per count to run concurrent to all other counts except count eighteen (18) and twenty-five (25). As to Count EIGHTEEN (18), the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **SIXTY (60) MONTHS** to run consecutive to all other counts. As to Count TWENTY-FIVE (25), the defendant is hereby

committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **THREE HUNDRED (300) MONTHS** to run consecutive to all other counts.

The Court recommends to the Bureau of Prisons:

As close to Chicago as possible

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for the periods specified for each count of conviction.

The defendant is sentenced on all count(s) of conviction to Supervised Release, said periods to run concurrent as follows:

Count	ELEVEN (11), SIXTEEN (16), EIGHTEEN (18), NINETEEN (19), TWENTY-ONE (21), TWENTY-SIX (26),	a period of	THREE (3) year(s) Supervised Release.

	TWENTY-SEVEN (27), THIRTY-SIX (36)		
Count	TWENTY-FIVE (25)	a period of	FIVE (5) year(s) Supervised Release.

The defendant shall report to the probation office in the district to which the defendant is released within seventy-two hours of release from the custody of the Bureau of Prisons. In addition, see the attached page(s) defining the mandatory, standard and discretionary conditions of supervised release that apply in this case.

Based on the defendant's inability to pay, the costs of incarceration are waived.

The defendant shall report immediately to the probation office in the district in which the defendant is to be supervised, but no later than seventy-two hours after sentencing. In addition, see the attached page(s) defining the mandatory, standard and discretionary conditions of probation that apply in this case.

MANDATORY CONDITIONS OF SUPERVISED RELEASE
(as set forth in 18 U.S.C. § 3583 and U.S.S.G. § 5D1.3)

1) For any offense, the defendant shall not commit another federal, state or local crime;

2) for any offense, the defendant shall not unlawfully possess a controlled substance;

3) for offenses committed on or after September 13, 1994, the defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within fifteen days of release from imprisonment and at least two periodic drug tests thereafter for use of a controlled substance as determined by the court;

4) for a domestic violence crime committed on or after September 13, 1994, as defined in 18 U.S.C. § 3561(b) by a defendant convicted of such an offense for the first time, the defendant shall attend a rehabilitation program in accordance with 18 U.S.C. § 3583(d);

5) for a defendant classified as a sex offender pursuant to 18 U.S.C. § 4042(c)(4), the defendant shall comply with the reporting and registration requirements set forth in 18 U.S.C. § 3583(d);

6) the defendant shall cooperate in the collection of a DNA sample from the defendant if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 and the Justice for All Act of 2004; and

7) The defendant shall pay any balance on the special assessment, restitution and/or fine imposed against the defendant.

STANDARD CONDITIONS OF SUPERVISED RELEASE

1) For any felony or other offense, the defendant shall not possess a firearm, ammunition, or destructive device as defined in 18 U.S.C. § 921;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer (travel outside the continental United States requires court authorization);

3) the defendant shall report to the probation officer as directed by the court or the probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall provide to the probation officer access to any requested financial information including, but not limited to, tax returns, bank statements, credit card statements, credit applications, etc.;

6) the defendant shall support his or her dependents and meet other family responsibilities;

7) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

8) the defendant shall notify the probation officer ten (10) days prior to any change in residence or employment;

9) the defendant shall refrain from excessive use of alcohol;

10) the defendant shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as requested by the probation officer to determine the use of any controlled substance;

11) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

12) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

13) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

14) the defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

15) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

16) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement; and

17) if this judgment imposes a special assessment, restitution or a fine, it shall be a condition of probation or supervised release that the defendant pay any such special assessment,

restitution or fine in accordance with the court's order set forth in the Criminal Monetary Penalties sheet of this judgment.

Other conditions imposed by the court:

While on supervised release, the defendant shall not commit another federal, state or local crime, shall comply with the standard conditions that have been adopted by this Court, and shall comply with the following additional conditions: The defendant shall not possess a firearm or destructive device. The costs of incarceration, supervision are waived. The defendant shall refrain from any unlawful use or possession of a controlled substance. The defendant shall submit to one urine screen within 15 days of release from custody and random drug tests thereafter, not to exceed 104 tests per year.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the "Schedule of Payments." Unless waived, the defendant shall pay interest on any restitution and/or fine of more than $2,500, unless the restitution and/or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(1). The payment options may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

Total Assessment(s)	Total Fine	Restitution	Mandatory Costs of Prosecution
$1,600.00	**Fine Waived**	**$**	**$**

The defendant shall notify the United States Attorney's Office having jurisdiction over the defendant within thirty days of any change of name, residence or mailing address until all special assessments, restitution, fines, and costs imposed by this judgment are fully paid.

SCHEDULE OF PAYMENTS

- Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs. If this judgment

imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment.

- All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate financial Responsibility Program, are to be by money order or certified check payable to the Clerk of the Court, U.S. District Court, unless otherwise directed by the Court.

- Unless waived, the defendant shall pay interest on any fine and/or restitution of more than $2,500, unless the same is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). Payment options included herein may be subject to penalties of default and delinquency pursuant to 18 U.S.C. § 3612(g).

- Pursuant to 18 U.S.C. § 3613(b) and (c) and 3664(m), restitution and/or fine obligations extend for twenty years after release from imprisonment, or from the date of entry of judgment if not sentenced to a period of imprisonment.

Payment of the total criminal monetary penalties shall be due as follows:
In full:

Due immediately.

Pursuant to 18 U.S.C. § 3664(k) the defendant must notify the court of any material changes in the defendant's economic circumstances. Upon such notice, the court may adjust the installment payment schedule.

Pursuant to 18 U.S.C. § 3664(n), if a person is obligated to provide restitution, or pay a fine, received substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

FORFEITURE

The defendant shall forfeit the defendant's interest in the following property to the United States:

The Court enters preliminary order of forfeiture in the amount of 10 million dollars without prejudice.

The defendant is immediately remanded to the custody of the United States Marshal.

Date of Imposition of Judgment/Sentencing: June 14, 2006

WAYNE R. ANDERSEN
UNITED STATES DISTRICT JUDGE

Dated at Chicago, Illinois this 16th day of June, 2006

United States District Court
Northern District of Illinois

UNITED STATES OF AMERICA	)	
	)	
v.	)	**Case Number: 02-CR-200-6**
	)	**Judge: Wayne R. Andersen**
ANDRE SEYMOUR	)	
	)	Robert Loeb, Defendant's Attorney
	)	Bart Huff, AUSA

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

THERE WAS A:

jury verdict of guilty as to count(s) ONE (1), FIFTEEN (15) of the INDICTMENT.

The remaining Counts are dismissed.

THE DEFENDANT IS CONVICTED OF THE OFFENSES(S) OF:

Title & Section	Description of Offense	Date Offense Concluded	Count Number(s)
21:846	Conspiracy to Possess with Intent to Distribute Cocaine and Cocaine Base	03/05/2002	ONE (1)
21:843(b)	Using a Communication Facility in the Commission of a Felony Violation	03/05/2002	FIFTEEN (15)

The defendant is sentenced as provided in the following pages of this judgment.

IMPRISONMENT

IT IS THE JUDGMENT OF THIS COURT THAT:

the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **THREE HUNDRED TWENTY-FOUR (324)**.

As to Count ONE (1), the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **THREE HUNDRED TWENTY-FOUR (324) MONTHS**. As to Count FIFTEEN (15), the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **FORTY-EIGHT (48) MONTHS** to run concurrent to count one.

The Court recommends to the Bureau of Prisons:

That the defendant be incarcerated in a facility that has the Comprehensive Drug Treatment Program or Oxford, Wisconsin

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for the periods specified for each count of conviction.

The defendant is sentenced on all count(s) of conviction to Supervised Release, said periods to run concurrent as follows:

Count	ONE (1)	a period of	TEN YEARS year(s) Supervised Release.
Count	FIFTEEN (15)	a period of	TEN (10) year(s) Supervised Release.

The defendant shall report to the probation office in the district to which the defendant is released within seventy-two hours of release from the custody of the Bureau of Prisons. In addition, see the attached page(s) defining the mandatory, standard and discretionary conditions of supervised release that apply in this case.

The defendant shall report immediately to the probation office in the district in which the defendant is to be supervised, but no later than seventy-two hours after sentencing. In addition, see the attached page(s) defining the mandatory, standard and discretionary conditions of probation that apply in this case.

MANDATORY CONDITIONS OF SUPERVISED RELEASE
(as set forth in 18 U.S.C. § 3583 and U.S.S.G. § 5D1.3)

1) For any offense, the defendant shall not commit another federal, state or local crime;

2) for any offense, the defendant shall not unlawfully possess a controlled substance;

3) for offenses committed on or after September 13, 1994, the defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within fifteen days of release from imprisonment and at least two periodic drug tests thereafter for use of a controlled substance as determined by the court:

4) for a domestic violence crime committed on or after September 13, 1994, as defined in 18 U.S.C. § 3561(b) by a defendant convicted of such an offense for the first time, the defendant shall attend a rehabilitation program in accordance with 18 U.S.C. § 3583(d);

5) for a defendant classified as a sex offender pursuant to 18 U.S.C. § 4042(c)(4), the defendant shall comply with the reporting and registration requirements set forth in 18 U.S.C. § 3583(d);

6) the defendant shall cooperate in the collection of a DNA sample from the defendant if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 and the Justice for All Act of 2004; and

7) The defendant shall pay any balance on the special assessment, restitution and/or fine imposed against the defendant.

STANDARD CONDITIONS OF SUPERVISED RELEASE

1) For any felony or other offense, the defendant shall not possess a firearm, ammunition, or destructive device as defined in 18 U.S.C. § 921;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer (travel outside the continental United States requires court authorization);

3) the defendant shall report to the probation officer as directed by the court or the probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall provide to the probation officer access to any requested financial information including, but not limited to, tax returns, bank statements, credit card statements, credit applications, etc.;

6) the defendant shall support his or her dependents and meet other family responsibilities;

7) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

8) the defendant shall notify the probation officer ten (10) days prior to any change in residence or employment;

9) the defendant shall refrain from excessive use of alcohol;

10) the defendant shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as requested by the probation officer to determine the use of any controlled substance;

11) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

12) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

13) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

14) the defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

15) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

16) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement; and

17) if this judgment imposes a special assessment, restitution or a fine, it shall be a condition of probation or supervised release that the defendant pay any such special assessment,

restitution or fine in accordance with the court's order set forth in the Criminal Monetary Penalties sheet of this judgment.

DISCRETIONARY CONDITIONS OF SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

Other conditions imposed by the court:

Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the district to which the defendant is released. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall not possess a firearm or destructive device. The defendant shall participate in a drug aftercare treatment program which may include urine testing at the direction of the probation officer. The Court waives the costs of imprisonment and supervision.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the "Schedule of Payments." Unless waived, the defendant shall pay interest on any restitution and/or fine of more than $2,500, unless the restitution and/or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). The payment options may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

Total Assessment(s)	Total Fine	Restitution	Mandatory Costs of Prosecution
$200.00	**Fine Waived**	**$**	**$**

The defendant shall notify the United States Attorney's Office having jurisdiction over the defendant within thirty days of any change of name, residence or mailing address until all special assessments, restitution, fines, and costs imposed by this judgment are fully paid.

Based on the defendant's inability to pay, the costs of incarceration are waived.

SCHEDULE OF PAYMENTS

- Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5)

community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs. If this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment.

- All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate financial Responsibility Program, are to be by money order or certified check payable to the Clerk of the Court, U.S. District Court, unless otherwise directed by the Court.

- Unless waived, the defendant shall pay interest on any fine and/or restitution of more than $2,500, unless the same is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). Payment options included herein may be subject to penalties of default and delinquency pursuant to 18 U.S.C. § 36 12(g).

- Pursuant to 18 U.S.C. § 3613(b) and (c) and 3664(m), restitution and/or fine obligations extend for twenty years after release from imprisonment, or from the date of entry of judgment if not sentenced to a period of imprisonment.

Payment of the total criminal monetary penalties shall be due as follows:
In full:

Due immediately.

Pursuant to 18 U.S.C. § 3664(k) the defendant must notify the court of any material changes in the defendant's economic circumstances. Upon such notice, the court may adjust the installment payment schedule.

Pursuant to 18 U.S.C. § 3664(n), if a person is obligated to provide restitution, or pay a fine, received substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

The defendant is immediately remanded to the custody of the United States Marshal.

RETURN OF SERVICE

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____
at _____.

By:_____
(Signature)

Name (Print)_____

Title (Print)_____

Date of Imposition of Judgment/Sentencing: September 21, 2005

WAYNE R. ANDERSEN
UNITED STATES DISTRICT JUDGE

Dated at Chicago, Illinois this 26th day of September, 2005

United States District Court
Northern District of Illinois

UNITED STATES OF AMERICA	)	
v.	)	**Case Number: 02-CR-200-11**
	)	**Judge: Wayne R. Andersen**
KENT CLARK	)	
	)	James Shapiro, Defendant's Attorney
	)	Reid Schar, AUSA

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

THERE WAS A:

jury verdict of guilty as to count(s) ONE (1), of the INDICTMENT.

The remaining Counts are dismissed.

THE DEFENDANT IS CONVICTED OF THE OFFENSES(S) OF:

Title & Section	Description of Offense	Date Offense Concluded	Count Number(s)
21:846	Narcotics Conspiracy	03/05/2002	ONE (1)

The defendant is sentenced as provided in the following pages of this judgment.

IMPRISONMENT

IT IS THE JUDGMENT OF THIS COURT THAT: the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **THREE HUNDRED (300) MONTHS.**

The Court recommends to the Bureau of Prisons:

Comprehensive Drug Treatment Oxford, Wisconsin. That the defendant remain at the Metropolitan Correctional Center until designation.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for the periods specified for each count of conviction.

The defendant is sentenced on all count(s) of conviction, namely, Counts ONE (1) to a period of TEN (10) years of Supervised Release.

The defendant shall report immediately to the probation office in the district in which the defendant is to be supervised, but no later than seventy- two hours after sentencing. In addition, see the attached page(s) defining the mandatory, standard and discretionary conditions of probation that apply in this case.

MANDATORY CONDITIONS OF SUPERVISED RELEASE
(as set forth in 18 U.S.C. § 3583 and U.S.S.G. § 5D1.3)

1) For any offense, the defendant shall not commit another federal, state or local crime;

2) for any offense, the defendant shall not unlawfully possess a controlled substance;

3) for offenses committed on or after September 13, 1994, the defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within fifteen days of release from imprisonment and at least two periodic drug tests thereafter for use of a controlled substance as determined by the court;

4) for a domestic violence crime committed on or after September 13, 1994, as defined in 18 U.S.C. § 3561(b) by a defendant convicted of such an offense for the first time, the defendant shall attend a rehabilitation program in accordance with 18 U.S.C. § 3583(d);

5) for a defendant classified as a sex offender pursuant to 18 U.S.C. § 4042(c)(4), the defendant shall comply with the reporting and registration requirements set forth in 18 U.S.C. § 3583(d);

6) the defendant shall cooperate in the collection of a DNA sample from the defendant if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 and the Justice for All Act of 2004; and

7) The defendant shall pay any balance on the special assessment, restitution and/or fine imposed against the defendant.

STANDARD CONDITIONS OF SUPERVISED RELEASE

1) For any felony or other offense, the defendant shall not possess a firearm, ammunition, or destructive device as defined in 18 U.S.C. § 921;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer (travel outside the continental United States requires court authorization);

3) the defendant shall report to the probation officer as directed by the court or the probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall provide to the probation officer access to any requested financial information including, but not limited to, tax returns, bank statements, credit card statements, credit applications, etc.;

6) the defendant shall support his or her dependents and meet other family responsibilities;

7) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

8) the defendant shall notify the probation officer ten (10) days prior to any change in residence or employment;

9) the defendant shall refrain from excessive use of alcohol;

10) the defendant shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as requested by the probation officer to determine the use of any controlled substance;

11) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

12) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

13) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

14) the defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

15) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

16) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement; and

17) if this judgment imposes a special assessment, restitution or a fine, it shall be a condition of probation or supervised release that the defendant pay any such special assessment,

restitution or fine in accordance with the court's order set forth in the Criminal Monetary Penalties sheet of this judgment.

DISCRETIONARY CONDITIONS OF SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

Other conditions imposed by the court:

Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in the district to which the defendant is released. The defendant shall not possess a firearm or destructive device. The court waives the costs of imprisonment and supervision. The defendant shall refrain from any unlawful use of a possession of a controlled substance. As required by statute, the defendant shall submit to nine urine screen within 15 days of release from custody and random drug tests thereafter, not to exceed 104 tests per year.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the "Schedule of Payments." Unless waived, the defendant shall pay interest on any restitution and/or fine of more than $2,500, unless the restitution and/or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). The payment options may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

Total Assessment(s)	Total Fine	Restitution	Mandatory Costs of Prosecution
$100.00	Fine Waived	$	$

The defendant shall notify the United States Attorney's Office having jurisdiction over the defendant within thirty days of any change of name, residence or mailing address until all special assessments, restitution, fines, and costs imposed by this judgment are fully paid.

Based on the defendant's inability to pay, the costs of incarceration are waived.

SCHEDULE OF PAYMENTS

- Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5)

community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs. If this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment.

- All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate financial Responsibility Program, are to be by money order or certified check payable to the Clerk of the Court, U.S. District Court, unless otherwise directed by the Court.

- Unless waived, the defendant shall pay interest on any fine and/or restitution of more than $2,500, unless the same is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). Payment options included herein may be subject to penalties of default and delinquency pursuant to 18 U.S.C. § 3612(g).

- Pursuant to 18 U.S.C. § 3613(b) and (c) and 3664(m), restitution and/or fine obligations extend for twenty years after release from imprisonment, or from the date of entry of judgment if not sentenced to a period of imprisonment.

Payment of the total criminal monetary penalties shall be due as follows:
In full:

Due immediately.

Pursuant to 18 U.S.C. § 3664(k) the defendant must notify the court of any material changes in the defendant's economic circumstances. Upon such notice, the court may adjust the installment payment schedule.
Pursuant to 18 U.S.C. § 3664(n), if a person is obligated to provide restitution, or pay a fine, received substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

The defendant is immediately remanded to the custody of the United States Marshal.

RETURN OF SERVICE

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____.

By:_____
(Signature)

Name (Print)_____

Title (Print)_____

Date of Imposition of Judgment/Sentencing: September 21, 2005

WAYNE R. ANDERSEN
UNITED STATES DISTRICT JUDGE

Dated at Chicago, Illinois this 22nd day of September, 2005

United States District Court
Northern District of Illinois

UNITED STATES OF AMERICA	)	
	)	
v.	)	**Case Number: 02-CR-200-13**
	)	**Judge: Wayne R. Andersen**
STACIA SMITH	)	
	)	R. Eugene Pincham, Defendant's Attorney
	)	Bart Huff, AUSA

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

THERE WAS A:

jury verdict of guilty as to count(s) ONE (1), TWENTY-ONE (21), TWENTY-SEVEN (27), TWENTY-FIVE (25) of the INDICTMENT.

THE DEFENDANT IS CONVICTED OF THE OFFENSES(S) OF:

Title & Section	Description of Offense	Date Offense Concluded	Count Number(s)
21:846	Narcotics Conspiracy	03/05/2002	ONE (1)
21:843(b)	Use of Telephone in Drug Conspiracy	03/05/2002	TWENTY-ONE (21), TWENTY-SEVEN (27)
18:924(c)	Using/Carrying a firearm in relation to drug offense	03/05/2002	TWENTY-FIVE (25)

The defendant is sentenced as provided in the following pages of this judgment.

IMPRISONMENT

IT IS THE JUDGMENT OF THIS COURT THAT: the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **TWENTY YEARS and ONE MONTH**.

As to Count ONE (1), the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **ELEVEN (11) YEARS and ONE (1) MONTH**. As to Count **TWENTY-ONE (21)** and **TWENTY-SEVEN (27)**, the defendant is sentenced to **THREE (3) YEARS** on each count to run concurrent to each other and to count one. As to **COUNT TWENTY-FIVE (25)**, the defendant is sentenced to **TEN (10) years**, which shall run consecutive to the other counts.

The Court recommends to the Bureau of Prisons:

As close to family as possible. Defendant shall participate in a drug and mental health treatment program.

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for the periods specified for each count of conviction.

The defendant is sentenced on all count(s) of conviction to Supervised Release, said periods to run concurrent as follows:
Count one, TEN (10) YEARS. Counts twenty-one and twenty-seven, THREE (3) YEARS each to run concurrent to each other and to count one. Count twenty-five, FIVE (5) YEARS to run concurrent to the other counts.

The defendant shall report to the probation office in the district to which the defendant is released within seventy-two hours of release from the custody of the Bureau of Prisons. In addition, see the attached page(s) defining the mandatory, standard and discretionary conditions of supervised release that apply in this case.

The defendant shall report immediately to the probation office in the district in which the defendant is to be supervised, but no later than seventy-two hours after sentencing. In addition, see the attached page(s) defining the mandatory, standard and discretionary conditions of supervised release that apply in this case.

MANDATORY CONDITIONS OF SUPERVISED RELEASE
(as set forth in 18 U.S.C. § 3583 and U.S.S.G. § 5D1.3)

1) For any offense, the defendant shall not commit another federal, state or local crime;

2) for any offense, the defendant shall not unlawfully possess a controlled substance;

3) for offenses committed on or after September 13, 1994, the defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within fifteen days of release from imprisonment and at least two periodic drug tests thereafter for use of a controlled substance as determined by the court;

4) for a domestic violence crime committed on or after September 13, 1994, as defined in 18 U.S.C. § 3561(b) by a defendant convicted of such an offense for the first time, the defendant shall attend a rehabilitation program in accordance with 18 U.S.C. § 3583(d);

5) for a defendant classified as a sex offender pursuant to 18 U.S.C. § 4042(c)(4), the defendant shall comply with the reporting and registration requirements set forth in 18 U.S.C. § 3583(d);

6) the defendant shall cooperate in the collection of a DNA sample from the defendant if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 and the Justice for All Act of 2004; and

7) The defendant shall pay any balance on the special assessment, restitution and/or fine imposed against the defendant.

STANDARD CONDITIONS OF SUPERVISED RELEASE

1) For any felony or other offense, the defendant shall not possess a firearm, ammunition, or destructive device as defined in 18 U.S.C. § 921;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer (travel outside the continental United States requires court authorization);

3) the defendant shall report to the probation officer as directed by the court or the probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall provide to the probation officer access to any requested financial information including, but not limited to, tax returns, bank statements, credit card statements, credit applications, etc.;

6) the defendant shall support his or her dependents and meet other family responsibilities;

7) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

8) the defendant shall notify the probation officer ten (10) days prior to any change in residence or employment;

9) the defendant shall refrain from excessive use of alcohol;

10) the defendant shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as requested by the probation officer to determine the use of any controlled substance;

11) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

12) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

13) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

14) the defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

15) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

16) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement; and

17) if this judgment imposes a special assessment, restitution or a fine, it shall be a condition of probation or supervised release that the defendant pay any such special assessment,

restitution or fine in accordance with the court's order set forth in the Criminal Monetary Penalties sheet of this judgment.

Other conditions imposed by the court:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall not possess a firearm or destructive device. The defendant shall participate in a drug aftercare and mental health aftercare treatment program which may include urine testing at the direction of the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the "Schedule of Payments." Unless waived, the defendant shall pay interest on any restitution and/or fine of more than $2,500, unless the restitution and/or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). The payment options may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

Total Assessment(s)	Total Fine	Restitution	Mandatory Costs of Prosecution
$400.00	Fine Waived	——— $	$

The defendant shall notify the United States Attorney's Office having jurisdiction over the defendant within thirty days of any change of name, residence or mailing address until all special assessments, restitution, fines, and costs imposed by this judgment are fully paid.

SCHEDULE OF PAYMENTS

- Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs. If this judgment

imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment.

- All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate financial Responsibility Program, are to be by money order or certified check payable to the Clerk of the Court, U.S. District Court, unless otherwise directed by the Court.

- Unless waived, the defendant shall pay interest on any fine and/or restitution of more than $2,500, unless the same is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). Payment options included herein may be subject to penalties of default and delinquency pursuant to 18 U.S.C. § 3612(g).

- Pursuant to 18 U.S.C. § 3613(b) and (c) and 3664(m), restitution and/or fine obligations extend for twenty years after release from imprisonment, or from the date of entry of judgment if not sentenced to a period of imprisonment.

Payment of the total criminal monetary penalties shall be due as follows:
In full:

Due immediately.

Pursuant to 18 U.S.C. § 3664(k) the defendant must notify the court of any material changes in the defendant's economic circumstances. Upon such notice, the court may adjust the installment payment schedule.

Pursuant to 18 U.S.C. § 3664(n), if a person is obligated to provide restitution, or pay a fine, received substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

The defendant is immediately remanded to the custody of the United States Marshal.

Date of Imposition of Judgment/Sentencing: October 26, 2005

_____

WAYNE R. ANDERSEN
UNITED STATES DISTRICT JUDGE

Dated at Chicago, Illinois this 7th day of November, 2005

United States District Court
Northern District of Illinois

UNITED STATES OF AMERICA	)	
	)	
v.	)	**Case Number: 02-CR-200-17**
	)	**Judge: Wayne R. Andersen**
ARTEZ NYROBY SEYMOUR	)	
	)	Nathan Diamond-Falk, Defendant's Attorney
	)	Reid Schar, AUSA

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

THERE WAS A:

jury verdict of guilty as to count(s) ONE (1), of the INDICTMENT.

The remaining Counts are dismissed.

THE DEFENDANT IS CONVICTED OF THE OFFENSES(S) OF:

Title & Section	Description of Offense	Date Offense Concluded	Count Number(s)
21:846	Narcotics Conspiracy	03/05/2002	ONE (1)

The defendant is sentenced as provided in the following pages of this judgment.

IMPRISONMENT

IT IS THE JUDGMENT OF THIS COURT THAT:

the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **THREE HUNDRED (300) MONTHS**.

The Court recommends to the Bureau of Prisons:

A facility that has the Comprehensive Drug Treatment program or Oxford, Wisconsin,

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for the periods specified for each count of conviction.

The defendant is sentenced on all count(s) of conviction, namely, Counts ONE (1) to a period of TEN (10) years of Supervised Release.

The defendant shall report immediately to the probation office in the district in which the defendant is to be supervised, but no later than seventy-two hours after sentencing. In addition, see the attached page(s) defining the mandatory, standard and discretionary conditions of probation that apply in this case.

MANDATORY CONDITIONS OF SUPERVISED RELEASE
(as set forth in 18 U.S.C. § 3583 and U.S.S.G. § 5D1.3)

1) For any offense, the defendant shall not commit another federal, state or local crime;

2) for any offense, the defendant shall not unlawfully possess a controlled substance;

3) for offenses committed on or after September 13, 1994, the defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within fifteen days of release from imprisonment and at least two periodic drug tests thereafter for use of a controlled substance as determined by the court:

4) for a domestic violence crime committed on or after September 13, 1994, as defined in 18 U.S.C. § 3561(b) by a defendant convicted of such an offense for the first time, the defendant shall attend a rehabilitation program in accordance with 18 U.S.C. § 3583(d);

5) for a defendant classified as a sex offender pursuant to 18 U.S.C. § 4042(c)(4), the defendant shall comply with the reporting and registration requirements set forth in 18 U.S.C. § 3583(d);

6) the defendant shall cooperate in the collection of a DNA sample from the defendant if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 and the Justice for All Act of 2004; and

7) The defendant shall pay any balance on the special assessment, restitution and/or fine imposed against the defendant.

STANDARD CONDITIONS OF SUPERVISED RELEASE

1) For any felony or other offense, the defendant shall not possess a firearm, ammunition, or destructive device as defined in 18 U.S.C. § 921;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer (travel outside the continental United States requires court authorization);

3) the defendant shall report to the probation officer as directed by the court or the probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall provide to the probation officer access to any requested financial information including, but not limited to, tax returns, bank statements, credit card statements, credit applications, etc.;

6) the defendant shall support his or her dependents and meet other family responsibilities;

7) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

8) the defendant shall notify the probation officer ten (10) days prior to any change in residence or employment;

9) the defendant shall refrain from excessive use of alcohol;

10) the defendant shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as requested by the probation officer to determine the use of any controlled substance;

11) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

12) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

13) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

14) the defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

15) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

16) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement; and

17) if this judgment imposes a special assessment, restitution or a fine, it shall be a condition of probation or supervised release that the defendant pay any such special assessment,

restitution or fine in accordance with the court's order set forth in the Criminal Monetary Penalties sheet of this judgment.

DISCRETIONARY CONDITIONS OF SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

Other conditions imposed by the court:
The defendant shall not possess a firearm or destructive device. The defendant shall participate in a drug aftercare treatment program which may include urine testing at the direction of the probation officer. Defendant shall participate in the collection of a DNA sample.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the "Schedule of Payments." Unless waived, the defendant shall pay interest on any restitution and/or fine of more than $2,500, unless the restitution and/or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). The payment options may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

Total Assessment(s)	Total Fine	Restitution	Mandatory Costs of Prosecution
$100.00	Fine Waived	$	$

The defendant shall notify the United States Attorney's Office having jurisdiction over the defendant within thirty days of any change of name, residence or mailing address until all special assessments, restitution, fines, and costs imposed by this judgment are fully paid.

Based on the defendant's inability to pay, the costs of incarceration are waived.

SCHEDULE OF PAYMENTS

- Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5)

community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs. If this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment.

- All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate financial Responsibility Program, are to be by money order or certified check payable to the Clerk of the Court, U.S. District Court, unless otherwise directed by the Court.

- Unless waived, the defendant shall pay interest on any fine and/or restitution of more than $2,500, unless the same is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). Payment options included herein may be subject to penalties of default and delinquency pursuant to 18 U.S.C. § 3612(g).

- Pursuant to 18 U.S.C. § 3613(b) and (c) and 3664(m), restitution and/or fine obligations extend for twenty years after release from imprisonment, or from the date of entry of judgment if not sentenced to a period of imprisonment.

Payment of the total criminal monetary penalties shall be due as follows:
In full:

Due immediately.

Pursuant to 18 U.S.C. § 3664(k) the defendant must notify the court of any material changes in the defendant's economic circumstances. Upon such notice, the court may adjust the installment payment schedule.

Pursuant to 18 U.S.C. § 3664(n), if a person is obligated to provide restitution, or pay a fine, received substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

The defendant is immediately remanded to the custody of the United States Marshal.

RETURN OF SERVICE

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____
at _____.

By: _____
(Signature)

Name (Print)_____

Title (Print)_____

Date of Imposition of Judgment/Sentencing: September 21, 2005

WAYNE R. ANDERSEN
UNITED STATES DISTRICT JUDGE

Dated at Chicago, Illinois this 28th day of September, 2005

United States District Court
Northern District of Illinois

UNITED STATES OF AMERICA	)	
	)	
v.	)	**Case Number: 02-CR-200-22**
	)	**Judge: Wayne R. Andersen**
ANDRE LAWRENCE	)	
	)	Mark Kusatsky, Defendant's Attorney
	)	Reid Schar, AUSA

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

THERE WAS A:

jury verdict of guilty as to count(s) ONE (1), and THIRTY-NINE (39) of the INDICTMENT.

The remaining Counts are dismissed.

THE DEFENDANT IS CONVICTED OF THE OFFENSES(S) OF:

Title & Section	Description of Offense	Date Offense Concluded	Count Number(s)
21:846	Narcotics Conspiracy	03/05/2002	ONE (1)
18:924(c)(1)(A)	Carrying A Firearm In Relation to Drug Offense	03/05/2002	THIRTY-NINE (39)

The defendant is sentenced as provided in the following pages of this judgment.

IMPRISONMENT

IT IS THE JUDGMENT OF THIS COURT THAT:

the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **THREE HUNDRED (360) MONTHS**.

As to Count ONE (1), the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **THREE HUNDRED (300) MONTHS**. As to Count THIRTY-NINE (39), the defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total uninterrupted term of **SIXTY (60) MONTHS**. Count thirty-nine (39) to run consecutive to Count one (1).

The Court recommends to the Bureau of Prisons:

Comprehensive Drug Treatment Program, Oxford, WI or as close to his family as possible

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for the periods specified for each count of conviction.

The defendant is sentenced on all count(s) of conviction, namely, Count ONE (1) to a period of TEN (10) years of Supervised Release and

THREE (3) years as to count thirty-nine (39), said periods to run concurrent.

The defendant shall report immediately to the probation office in the district in which the defendant is to be supervised, but no later than seventy-two hours after sentencing. In addition, see the attached page(s) defining the mandatory, standard and discretionary conditions of probation that apply in this case.

MANDATORY CONDITIONS OF SUPERVISED RELEASE
(as set forth in 18 U.S.C. § 3583 and U.S.S.G. § 5D1.3)

1) For any offense, the defendant shall not commit another federal, state or local crime;

2) for any offense, the defendant shall not unlawfully possess a controlled substance;

3) for offenses committed on or after September 13, 1994, the defendant shall refrain from any unlawful use of a controlled substance and submit to one drug test within fifteen days of release from imprisonment and at least two periodic drug tests thereafter for use of a controlled substance as determined by the court:

4) for a domestic violence crime committed on or after September 13, 1994, as defined in 18 U.S.C. § 3561(b) by a defendant convicted of such an offense for the first time, the defendant shall attend a rehabilitation program in accordance with 18 U.S.C. § 3583(d);

5) for a defendant classified as a sex offender pursuant to 18 U.S.C. § 4042(c)(4), the defendant shall comply with the reporting and registration requirements set forth in 18 U.S.C. § 3583(d);

6) the defendant shall cooperate in the collection of a DNA sample from the defendant if the collection of such a sample is authorized pursuant to section 3 of the DNA Analysis Backlog Elimination Act of 2000 and the Justice for All Act of 2004; and

7) The defendant shall pay any balance on the special assessment, restitution and/or fine imposed against the defendant.

STANDARD CONDITIONS OF SUPERVISED RELEASE

1) For any felony or other offense, the defendant shall not possess a firearm, ammunition, or destructive device as defined in 18 U.S.C. § 921;

2) the defendant shall not leave the judicial district without the permission of the court or probation officer (travel outside the continental United States requires court authorization);

3) the defendant shall report to the probation officer as directed by the court or the probation officer and shall submit a truthful and complete written report within the first five days of each month;

4) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

5) the defendant shall provide to the probation officer access to any requested financial information including, but not limited to, tax returns, bank statements, credit card statements, credit applications, etc.;

6) the defendant shall support his or her dependents and meet other family responsibilities;

7) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

8) the defendant shall notify the probation officer ten (10) days prior to any change in residence or employment;

9) the defendant shall refrain from excessive use of alcohol;

10) the defendant shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician, and shall submit to periodic urinalysis tests as requested by the probation officer to determine the use of any controlled substance;

11) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

12) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

13) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

14) the defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

15) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

16) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement; and

17) if this judgment imposes a special assessment, restitution or a fine, it shall be a condition of probation or supervised release that the defendant pay any such special assessment,

restitution or fine in accordance with the court's order set forth in the Criminal Monetary Penalties sheet of this judgment.

DISCRETIONARY CONDITIONS OF SUPERVISED RELEASE

The defendant shall also comply with the following additional conditions of supervised release:

Other conditions imposed by the court:
The defendant shall not possess a firearm or destructive device. The Court waives the costs of incarceration and supervision. Within 72 hours of release from the custody of the Bureau of prisons, the defendant shall report in person to the probation office in the district to which the defendant is released. Defendant has ten (10) years of supervised release as to count one (1) AND three (3) years of supervised release on count thirty-nine (39), to run concurrent to each other. The defendant shall participate in a drug aftercare treatment program which may include urine testing at the direction of the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the "Schedule of Payments." Unless waived, the defendant shall pay interest on any restitution and/or fine of more than $2,500, unless the restitution and/or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). The payment options may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

Total Assessment(s)	Total Fine	Restitution	Mandatory Costs of Prosecution
$200.00	**Fine Waived**	**$**	**$**

The defendant shall notify the United States Attorney's Office having jurisdiction over the defendant within thirty days of any change of name, residence or mailing address until all special assessments, restitution, fines, and costs imposed by this judgment are fully paid.

Based on the defendant's inability to pay, the costs of incarceration are waived.

SCHEDULE OF PAYMENTS

- Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5)

community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs. If this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment.

- All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate financial Responsibility Program, are to be by money order or certified check payable to the Clerk of the Court, U.S. District Court, unless otherwise directed by the Court.

- Unless waived, the defendant shall pay interest on any fine and/or restitution of more than $2,500, unless the same is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). Payment options included herein may be subject to penalties of default and delinquency pursuant to 18 U.S.C. § 3612(g).

- Pursuant to 18 U.S.C. §§ 3613(b) and (c) and 3664(m), restitution and/or fine obligations extend for twenty years after release from imprisonment, or from the date of entry of judgment if not sentenced to a period of imprisonment.

Payment of the total criminal monetary penalties shall be due as follows:
In full:

Due immediately.

Pursuant to 18 U.S.C. § 3664(k) the defendant must notify the court of any material changes in the defendant's economic circumstances. Upon such notice, the court may adjust the installment payment schedule.

Pursuant to 18 U.S.C. § 3664(n), if a person is obligated to provide restitution, or pay a fine, received substantial resources from any source, including inheritance, settlement, or other judgment, during a period of incarceration, such person shall be required to apply the value of such resources to any restitution or fine still owed.

FORFEITURE

The defendant shall forfeit the defendant's interest in the following property to the United States:

Defendant shall forfeit any interest that he has in the house located at 6449 Claremont, its contents, firearms, bullet proof vest.

The defendant is immediately remanded to the custody of the United States Marshal.

RETURN OF SERVICE

I have executed this judgment as follows:

_____

_____

_____

_____

Defendant delivered on _____ to _____ at _____.

By:_____
(Signature)

Name (Print)_____

Title (Print)_____

Date of Imposition of Judgment/Sentencing: September 19, 2005.

WAYNE R. ANDERSEN
UNITED STATES DISTRICT JUDGE

Dated at Chicago, Illinois this 22nd day of September, 2005

APPENDIX – PART D

Title 21 United States Code (USC)
Controlled Substances Act

Section 841. Prohibited Acts A

Unlawful acts

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally --

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

Penalties

(b) Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection

(a) of this section involving –

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4- piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 100 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 1 kilogram or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers; such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation

after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 845, 845a, or 845b of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. For purposes of this subparagraph, the term "felony drug offense" means an offense that is a felony under any provision of this subchapter or any other Federal law that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances or a felony under any law of a State or a foreign country that prohibits or restricts conduct relating to narcotic drugs, marihuana, or depressant or stimulant substances. Any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of

supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving –

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4- piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 10 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 100 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers; such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if

the defendant is other than an individual, or both. Any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II , or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions for an offense punishable under this paragraph, or for a felony under any other

provision of this subchapter or subchapter II of this chapter or other law of a State, the United States or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more

marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil or in the case of any controlled substance in schedule III, or 30 milligrams of flunitrazepam, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised

release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 3 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more prior convictions of him for an offense punishable under this paragraph, or for a felony under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 6 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised

release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after one or more convictions of him for an offense punishable under this paragraph, or for a crime under any other provision of this subchapter or subchapter II of this chapter or other law of a State, the United States, or a foreign country relating to narcotic drugs, marihuana, or depressant or stimulant substances, have become final, such person shall be sentenced to a term of imprisonment of not more than 2 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration

shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violates subsection (a) of this section by cultivating a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed –

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of Title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a) of this section, or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use –

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water, shall be fined in accordance with Title 18, or imprisoned not more than five years, or both.

(7) Penalties for distribution.—

(A) In general.--Whoever, with intent to commit a crime of violence, as defined in section 16 of title 18, United States Code (including rape), against an individual, violates subsection (a) by distributing a controlled substance to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18, United States Code.

(B) Definition.--For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

(c) Offenses involving listed chemicals

Any person who knowingly or intentionally –

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this title; or

(3) with the intent of causing the evasion of the record-keeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with Title 18, or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

(d) Boobytraps on Federal property; penalties; "boobytrap" defined

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years and shall be fined not more than $10,000.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years and shall be fined not more than $20,000.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(e) Ten-year injunction as additional penalty

In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical may be enjoined from engaging in any transaction involving a listed chemical for not more than ten years.

(f) Wrongful distribution or possession of listed chemicals

(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall be fined under Title 18, or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under Title 18, or imprisoned not more than one year, or both.

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FILED

SEP 26 2008

No. 07-1608

In the Supreme Court of the United States

ANDRE SEYMOUR, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the rule of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), prohibits imposition of an enhanced sentence based on drug quantity for conspiracy to possess a controlled substance with intent to distribute it, in violation of 21 U.S.C. 846, unless the jury finds beyond a reasonable doubt the amount of drugs attributable to the defendant himself, as opposed to the conspiracy as a whole.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 519 F.3d 700. The opinion of the district court (Pet. App. 32a-37a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 2008. The petition for a writ of certiorari was filed on June 23, 2008 (Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners Kent Clark, Andre Lawrence, Troy Lawrence, Andre Seymour, Artrez Nyroby Seymour, and Stacia Smith were convicted of various drug and firearms charges,

including conspiracy to distribute and to possess with intent to distribute 50 grams or more of crack cocaine within 1000 feet of an elementary school, in violation of 21 U.S.C. 846. The district court sentenced petitioners to the following terms of imprisonment for the conspiracy convictions: 300 months for Clark; 300 months for Andre Lawrence; life imprisonment for Troy Lawrence; 324 months for Andre Seymour; 300 months for Artrez Seymour; and 133 months for Smith. The district court also sentenced Troy Lawrence to concurrent terms of life imprisonment for five additional drug convictions. The court of appeals affirmed petitioners' sentences. Pet. App. 1a-31a, 42a, 57a, 71a, 84a, 96a, 109a.

1. Petitioners were long-standing members of a crack trafficking organization (the Organization) that operated in Chicago Heights, Illinois, between the early 1990s and March 2002. Initially, the Organization sold crack at Wentworth Gardens. In the late 1990s, when the buildings around Wentworth Gardens were condemned, the Organization moved to the Claude Court area of Chicago Heights, which was located less than 1000 feet from an elementary school. Pet. App. 3a, 20a.

The Organization had essentially the same structure at both Wentworth Gardens and Claude Court. Troy Lawrence was responsible for buying powder cocaine from one of his suppliers. He stored the cocaine and had it cooked into crack at various stash houses, which were residences of members of the Organization. Once the crack was prepared, members of the Organization referred to as "baggers" packaged the crack into small plastic bags, 50 of which would be placed into a bigger plastic bag, which was referred to as a "fifty pack." Pet. App. 3a-4a.

After the crack was packaged, a member of the Organization referred to as a "runner" brought it to the sales area. The runner also picked up drug sale proceeds from the sales area. The runner usually provided the crack to a member of the Organization referred to as a "shift supervisor" and also picked up drug proceeds from the shift supervisor. The shift supervisor was the manager of the sales area. If the area was running low on crack, the shift supervisor called other members of the Organization to get more. After receiving the drugs, the shift supervisor provided the crack to a member of the Organization referred to as a "packman," who was responsible for directly selling the crack to customers. Shift supervisors were thus aware of the amount of crack going into the sales area and to each packman. Pet. App. 4a, 21a.

The Organization also assigned members to security. Those members monitored the drug sales area, watching for law enforcement or anyone who might try to rob an Organization member. Organization members carried guns for protection and drove cars with hidden compartments for concealing guns and drugs. Pet. App. 4a.

Troy Lawrence was the leader of the Organization from its inception in the early 1990s until his arrest in 2002. He purchased most of the cocaine from the Organization's suppliers, directed the operation of the stash houses and the daily shifts at the sales areas, held meetings to discuss the operations with other members of the Organization, controlled the amount of money each member was paid and whether members moved up in the Organization, and made decisions about who was disciplined and how. Pet. App. 11a.

Kent Clark worked for the Organization from 1996 until his arrest in January of 2002. Clark was a shift

supervisor at Wentworth Gardens. At Claude Court, Clark collected drug proceeds and transported money for the Organization. Pet. App. 11a.

Andre Lawrence worked for the Organization from at least 1999 until 2002. He received cocaine from an Organization supplier, transported and bagged crack, and operated a stash house in his home. On one occasion, he gave another member a huge piece of crack, either softball-sized or football-sized, to be bagged. On another occasion, law enforcement intercepted a phone call in which an Organization member was talking to Troy Lawrence about picking up a "big mac," which is approximately 500 grams of crack, from Andre Lawrence's house. Pet. App. 13a.

Andre Seymour worked as a shift supervisor for approximately two years at the Claude Court drug sales location. He received drugs, handled drug proceeds, bagged crack at the stash houses, participated in Organizational beatings to enforce discipline, attended Organization meetings, and obtained a gun for the Organization. Pet. App. 12a.

Artrez Seymour worked for the Organization from 1998 until at least 2001. At both Wentworth Gardens and Claude Court, he worked as a packman and as security. On July 5, 2000, police officers seized 44 small plastic bags containing crack that he had dumped as he ran from the officers. Pet. App. 7a, 12a.

Stacia Smith, who was Troy Lawrence's girlfriend, "worked for the Organization for an uncertain but undoubtedly long period of time." Pet. App. 12a. She was a runner at both Wentworth Gardens and Claude Court and operated a stash house at her residence, where members of the Organization frequently bagged crack. One Organization member saw Smith deliver drugs or

pick up money approximately 100 times at Wentworth Gardens and approximately 20 to 30 times at Claude Court. Another member reported that Smith delivered drugs twice a week at Wentworth Gardens. In a phone call intercepted by law enforcement, Troy Lawrence directed Smith to deliver $4000 worth of crack, or roughly 100 grams, to another Organization member. *Ibid.*

The Organization handled large amounts of both powder and crack cocaine. For example, one of the Organization's cocaine suppliers, Mark Connor, stated that he sold powder and crack cocaine to petitioner Troy Lawrence on numerous occasions between 1997 and 2002. Initially, Connor sold Troy approximately 4.5 ounces of cocaine once or twice a week for conversion into crack. Over time, the drug deals increased in size, including deals for between one and three kilograms of cocaine. Pet. App. 5a.

The Organization sold crack 24 hours a day, seven days a week, and employed approximately 10 to 15 people. Levert Griffin, a runner, estimated that he delivered $4000 to $10,000 worth of cocaine in a single eight-hour shift Darren Stewart, an Organization member since 1996, who worked as a packman from 1997 to 1999, estimated that the Organization sold about $20,000 of crack each day. Pet. App. 6a, 10a-11a, 19a, 20a.

At various times, law enforcement agents seized drugs, drug proceeds, and firearms from Organization members. For example, on December 26, 2001, agents discovered a gun and 10.9 grams of crack in a hidden compartment in Griffin's car. When agents searched Organization member Tasha Deere's vehicle on January 24, 2002, they discovered 227 grams of crack in a similar compartment. On January 27, 2002, agents seized 211 grams of crack from the vehicle of Organization member

Cameron Wilson. On February 5, 2002, during a police chase, an Organization supplier dumped 4.4 kilograms of powder cocaine out the window of his vehicle. On March 5, 2002, in a search of Troy Lawrence's home, agents discovered over $171,000 in cash as well as firearms. In a search of petitioner Andre Lawrence's home, agents found thousands of dollars in cash, two loaded guns, ammunition, and drug paraphernalia. In a search of two other stash houses, officers discovered 297.8 grams of crack and 496.4 grams of powder cocaine. Pet. App. 8a-9a; Gov't C.A. Br. 21-24.

In addition, between April and June of 2001, undercover law enforcement officers made seven controlled purchases of crack, totaling 172.2 grams, in the Claude Court drug sales area. Pet. App. 10a.

2. On July 16, 2002, a grand jury in the United States District Court for the Northern District of Illinois returned a 40-count indictment charging petitioners and 20 other individuals with drug and firearms offenses based on the Organization's activities. Count 1 charged each petitioner with conspiring to distribute and to possess with intent to distribute in excess of five kilograms of cocaine and in excess of 50 grams of cocaine base (*i.e.*, crack) within 1000 feet of an elementary school, in violation of 21 U.S.C. 846. Indictment 1-8. The indictment also charged several petitioners with other drug or firearms offenses. In particular, Troy Lawrence was charged with four counts of possessing crack cocaine with the intent to distribute it and one count of attempting to possess crack cocaine with the intent to distribute it, all in violation of 21 U.S.C. 841(a)(1). Indictment 24, 31, 42, 44-45.

On June 25, 2003, the government filed informations against five of the petitioners—Kent Clark, Andre Law-

rence, Troy Lawrence, Andre Seymour, and Artrez Seymour—giving notice of its intent to seek enhanced statutory penalties based on their prior felony drug convictions. See 21 U.S.C. 851. The government stated that petitioners Clark, Andre Lawrence, Andre Seymour, and Artrez Seymour each had one prior felony drug conviction and petitioner Troy Lawrence had more than two prior felony drug convictions. See Gov't C.A. Br. 5. Consequently, the government stated, under 21 U.S.C. 841(b)(1)(A), Clark, Andre Lawrence, Andre Seymour, and Artrez Seymour each faced a statutory maximum sentence for the drug conspiracy charge of life imprisonment, and Troy Lawrence faced a mandatory sentence of life imprisonment. See Gov't C.A. Br. 5-6.

On December 18, 2003, a jury found all six petitioners guilty of the drug conspiracy charge. The jury specifically found that the object of the conspiracy was to distribute or to possess with intent to distribute 50 grams or more of cocaine base (*i.e.*, crack). Verdict 1-2. The jury also found several petitioners guilty of other drug or firearms charges. As relevant here, the jury found Troy Lawrence guilty of the five substantive crack charges. *Id.* at 3-9. For one of those charges, the jury expressly found that the amount of crack involved was 50 grams or more. *Id.* at 5; see Gov't C.A. Br. 6.

Petitioners filed numerous post-trial motions, which the district court denied. In particular, petitioners Clark, Andre Lawrence, Andre Seymour, and Artrez Seymour filed a "Motion For Sentencing Under 21 U.S.C. 841(b)(1)(C)," which applies to drug offenses involving any amount of controlled substances. They argued that, in sentencing them for the crack conspiracy, the district court could not impose the enhanced statutory penalties based on drug quantities set forth in 21

U.S.C. 841(b)(1) because the jury failed to make specific findings of the amount of crack that each defendant could reasonably have foreseen would be involved in the conspiracy. See Gov't C.A. Br. 6-7. On September 8, 2005, the district court issued a written opinion denying that motion. Pet. App. 32a-37a. The court ruled that, "in order for the enhanced maximum penalties found in subparagraphs (A) and (B) of 841(b)(1) to apply, the jury need not make defendant-specific findings, but rather need only find the amount and type of drugs that were involved in the conspiracy charged—exactly what was done in this case." *Id.* at 36a. The court also noted that each petitioner faced potentially higher punishments because of his prior drug felony conviction. *Id.* at 37a.

Petitioners were sentenced to the following terms of imprisonment for their conspiracy convictions: (1) 300 months for Kent Clark (Pet. App. 71a); (2) 300 months for Andre Lawrence (*id.* at 109a); (3) 324 months for Andre Seymour (*id.* at 57a); (4) 300 months for Artrez Seymour (*id.* at 96a); (5) 133 months for Stacia Smith (*id.* at 84a); and (6) life imprisonment for Troy Lawrence (*id.* at 42a). Troy Lawrence was also sentenced to an additional term of life imprisonment on each of the substantive drug convictions. *Ibid.*

3. The court of appeals affirmed petitioners' sentences. Pet. App. 1a-31a. As relevant here, the court rejected their argument that, under the rule of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), a defendant who has been convicted of a drug conspiracy under 21 U.S.C. 846 can be subjected to the enhanced statutory penalties based on drug quantity set forth in 21 U.S.C. 841(b)(1)(A) only if the jury has made a "defendant-specific drug quantity determination." Pet. App. 18a. The court explained:

> Once a jury has determined that a conspiracy involved a type and quantity of drugs, and has found a particular defendant guilty of participating in the conspiracy, the jury has established the statutory maximum sentence that any one participant in the conspiracy may receive. See [*United States* v.] *Knight*, 342 F.3d [697,] 710 [(7th Cir. 2003), cert. denied, 540 U.S. 1227 (2004)]. Once the drug quantity and type for the conspiracy as a whole are determined by the jury, the judge may lawfully determine the drug quantity attributable to each defendant and sentence him accordingly so long as that determination does not exceed the statutory maximum sentence determined by the jury. *Id.* * * * "The rule, then, is that the government need only allege and prove to the jury the bare facts necessary to increase the statutory sentencing maximum for the conspiracy as a whole." *Id.*; see *Edwards* v. *United States*, 523 U.S. 511, 513-[5]14 (1998).

Ibid.

In addition, the court of appeals rejected petitioners' arguments that the district court had erred in attributing 1.5 kilograms or more of crack to each of them for sentencing purposes. Pet. App. 18a-20a. After reviewing the extensive evidence demonstrating that the Organization was a "massive drug trafficking operation," the court of appeals concluded that "an individual need not be involved in the Organization for more than a couple of weeks to be a part of 1.5 kilograms of crack sales." *Id.* at 20a. The court noted that the evidence demonstrated that petitioners all played "critical roles" and had "long tenures" in the Organization. *Ibid.* Accordingly, the court held that "[t]here was overwhelming

evidence" that "each of them could easily foresee that the conspiracy involved 1.5 or more kilograms of cocaine base." *Id.* at 22a.

ARGUMENT

Petitioners contend (Pet. 7-26) that their Sixth Amendment rights were violated because they were exposed to an enhanced statutory maximum sentence under 21 U.S.C. 841(b) for their crack conspiracy convictions based on the jury's finding of the amount of drugs involved in the conspiracy as a whole, rather than the amount of drugs reasonably foreseeable to each particular petitioner. They further contend that the decision of the court of appeals conflicts with decisions of other circuits. Petitioners' claim does not warrant this Court's review.

The court of appeals correctly held that the statutory maximum sentence under Section 841(b) is determined by a jury's finding of the amount of drugs involved in the conspiracy as a whole. Furthermore, this case is an inappropriate vehicle for resolution of any conflict among the courts of appeals because petitioners would not be entitled to any relief even if they were correct that a defendant-specific finding of drug quantity is required. Five petitioners received sentences below the applicable statutory maximum for offenses involving any quantity of cocaine. The remaining petitioner's overall sentence would also not be affected by reversal of his sentence for the conspiracy offense because he is subject to life sentences on five other counts of conviction. Moreover, any failure to make a defendant-specific drug quantity finding was harmless because there was overwhelming evidence that each petitioner could reasonably have foreseen that the conspiracy would involve far more than the

50 grams of crack necessary to trigger a maximum sentence of life imprisonment.

1. Petitioners argue (Pet. 7-26) that their sentences violated the rule of *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), because, in their view, *Apprendi* requires that the statutory maximum penalty for each defendant convicted of a drug conspiracy under 21 U.S.C. 846 be based on a jury's finding of the amount of drugs reasonably foreseeable to that defendant rather than the amount of drugs involved in the conspiracy as a whole. The court of appeals correctly rejected that argument.

In *Apprendi*, this Court held, as a matter of constitutional law, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 530 U.S. at 490. A drug conspiracy is subject to the graduated penalties set forth in 21 U.S.C. 841(b). Under 21 U.S.C. 841(b)(1)(C), the statutory maximum penalty for a drug offense involving any amount of cocaine is 20 years, or 30 years if the defendant has a prior drug felony conviction. Under 21 U.S.C. 841(b)(1)(A), the statutory maximum increases to life imprisonment if the offense involves 50 grams or more of cocaine base.

As the court of appeals correctly held, the facts (other than a prior conviction) that establish the statutory maximum for a drug conspiracy (and that must be found by the jury beyond a reasonable doubt) are the type and amount of drugs involved in the conspiracy. Pet. App. 15a-18a. "Once the drug quantity and type for the conspiracy as a whole are determined by the jury, the judge may lawfully determine the drug quantity attributable to each defendant and sentence him accordingly" so long as the sentence falls within the statutory maximum

made applicable by the jury's conspiracy-wide drug quantity determination. *Id.* at 18a (citing *United States* v. *Knight*, 342 F.3d 697, 710 (7th Cir. 2003), cert. denied, 540 U.S. 1227 (2004)); accord *United States* v. *Stiger*, 413 F.3d 1185, 1192 (10th Cir.), cert. denied, 546 U.S. 1049 (2005); *United States* v. *Phillips*, 349 F.3d 138, 142-143 (3d Cir. 2003), vacated on other grounds by *Barbour* v. *United States*, 543 U.S. 1102 (2005); *United States* v. *Turner*, 319 F.3d 716, 722-723 (5th Cir.), cert. denied, 538 U.S. 1017 (2003); *Derman* v. *United States*, 298 F.3d 34, 43 (1st Cir.), cert. denied, 537 U.S. 1048 (2002).[1]

As the court of appeals explained, the jury in this case returned a special verdict finding that the conspiracy involved 50 grams or more of crack. Pet. App. 17a; Verdict 1-2. That finding authorized a statutory maximum penalty of life imprisonment for each petitioner, because the jury found each of them guilty of participating in the conspiracy. See Pet. App. 16a-17a; 18 U.S.C. 841(b)(1)(A), 846. "The district court judge's determinations regarding the drug quantity attributable to each [petitioner] did not increase the penalty for the crime beyond the statutory maximum, as determined by the jury, of life imprisonment." Pet. App. 17a. Thus, "[t]here was no *Apprendi* error." *Ibid.*

Petitioners' argument that the statutory maximum for each defendant must be determined by a jury's finding of the amount of drugs reasonably foreseeable to that particular defendant is contrary to the plain language of the drug statutes. The drug conspiracy statute

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[1] Although petitioner suggests (Pet. 18 n.3) that the First Circuit retreated from its holding in *Derman* in *United States* v. *Nelson-Rodriguez*, 319 F.3d 12, cert. denied, 539 U.S. 928, 540 U.S. 831, and 540 U.S. 845 (2003), that is not correct. *Nelson-Rodriguez* reaffirms that *Derman* is the law of the First Circuit. 319 F.3d at 46-47.

states that conspirators "shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the * * * conspiracy." 21 U.S.C. 846. Under 21 U.S.C. 841(b), the maximum penalties for drug offenses turn on the type and amount of drugs "involv[ed]" in the "violation." 21 U.S.C. 841(b)(1)(A). The statutes thus make clear that the statutory maximum depends on the type and amount of drugs involved in the conspiracy. No language in either statute suggests that the statutory maximum varies depending on the amount of drugs "reasonably foreseeable" to each individual conspirator.

Edwards v. *United States*, 523 U.S. 511 (1998), supports the court of appeals' conclusion that the statutory maximum for a drug conspiracy is determined based on the drug type and quantity involved in the conspiracy as a whole. As the First Circuit explained in *Derman*, in *Edwards*, this Court held that "as long as (1) the jury finds beyond a reasonable doubt that a defendant participated in a conspiracy, and (2) the Court sentences him within the statutory maximum *applicable to that conspiracy*, the court may 'determine both the amount and the kind of "controlled substances" for which the defendant should be held accountable—and then . . . impose a sentence that varies depending upon amount and kind.'" *Derman*, 298 F.3d at 42 (brackets omitted) (quoting *Edwards*, 523 U.S. at 513-514); see *Edwards*, 523 U.S. at 515 (noting that the petitioners' sentences did not exceed "the maximum that the statutes permit for a cocaine-only conspiracy").

As the First Circuit further explained, *Apprendi* "did not purport to overrule *Edwards*." *Derman*, 298 F.3d at 42. Instead, the two decisions are "easily harmonized." *Ibid.* "[I]n a drug conspiracy case, the jury

should determine the existence vel non of the conspiracy as well as any facts about the conspiracy that will increase the possible penalty for the crime of conviction beyond the default statutory maximum; and the judge should determine at sentencing, the particulars regarding the involvement of each participant in the conspiracy. This means that once the jury has determined that the conspiracy involved a type and quantity of drugs sufficient to justify a sentence above the default statutory maximum and has found a particular defendant guilty of participation in the conspiracy, the judge lawfully may determine the drug quantity attributable to that defendant and sentence him accordingly" within the applicable statutory maximum set by "the jury's conspiracy-wide drug quantity determination." *Id.* at 42-43.

United States v. *Cotton*, 535 U.S. 625 (2002), also supports the decision below. In *Cotton*, this Court held that the imposition of life sentences on defendants convicted of conspiracy under 21 U.S.C. 846 was not plain error, even though the amount was not alleged in the indictment or found by the jury, because "overwhelming" and "essentially uncontroverted" evidence showed that "the conspiracy involved at least 50 grams of cocaine base." 535 U.S. at 633. The Court's analysis focused on the drug quantity involved in the conspiracy as a whole. Three separate times the Court referred to the fact that "the *conspiracy* involved at least 50 grams of cocaine base." *Ibid.* (emphasis added); see *ibid.* (evidence "revealed the *conspiracy's* involvement with far more than 50 grams of cocaine base") (emphasis added). Nothing in the Court's reasoning suggested that the statutory maximum for the conspiracy would vary depending on the quantity of cocaine base attributable to each defendant. On the contrary, the Court stated that

"the relevant quantity for purposes of *Apprendi*" was the amount of cocaine "that the conspiracy involved." *Id.* at 633 n.3.

2. Petitioners argue (Pet. 12-21) that this Court's review is warranted because the court of appeals' ruling conflicts with decisions of other courts of appeals. Although there is disagreement among the courts of appeals, petitioners overstate the extent of the conflict. And this case is not an appropriate vehicle to resolve the disagreement among the courts of appeals that does exist.

a. As petitioners note, the decision below conflicts with *United States* v. *Collins*, 415 F.3d 304 (4th Cir. 2005). In *Collins*, the Fourth Circuit held that, in order to impose the enhanced statutory maximums in 21 U.S.C. 841(b) on a defendant convicted of a drug conspiracy, a jury must determine the quantity of drugs attributable to that particular defendant based on the coconspirator liability principles set forth in *Pinkerton* v. *United States*, 328 U.S. 640 (1946). See *Collins*, 415 F.3d at 313-314.[2]

The ruling in *Collins* is incorrect. The court in *Collins* did not examine the language of the drug statutes, nor discuss the well-reasoned, contrary decisions of other courts of appeals. Nor did the court adequately explain why *Pinkerton* principles should apply in determining the penalty for conviction of a drug conspiracy. *Pinkerton* provides that a defendant is substantively liable for the reasonably foreseeable criminal acts of a coconspirator. Accordingly, as the *Collins* court itself

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[2] The Fourth Circuit has applied *Collins* in subsequent cases. See *United States* v. *Brooks*, 524 F.3d 549, 557-558 (2008); *United States* v. *Foster*, 507 F.3d 233, 250 (2007), cert. denied, 128 S. Ct. 1690 (2008); *United States* v. *Munson*, 181 Fed. Appx. 368, 369 (2006).

stated, "*Pinkerton* principles are relevant when a conspirator is charged with a substantive offense arising from the actions of a coconspirator, not when a conspirator is charged with conspiracy." 415 F.3d at 313.

The other cases identified by petitioner (Pet. 14-15, 17 n.2) do not conflict with the decision below. In the cases from the Second Circuit, there was neither a jury finding nor an admission by the defendant of the amount and type of drugs involved in the conspiracy as a whole. See *United States* v. *Adams*, 448 F.3d 492, 499 (2d Cir. 2006) (defendant did not admit to drug quantity or type in connection with his guilty plea but was sentenced as if he had participated in a conspiracy involving five kilograms of cocaine); *United States* v. *Gonzalez*, 420 F.3d 111, 132-133 (2d Cir. 2005) (defendant did not admit to drug quantity in connection with his guilty plea but was sentenced as if he had participated in a conspiracy involving 50 grams or more of crack). In this case, in contrast, the jury made a specific finding that the conspiracy involved 50 grams or more of crack.

Nor is there any conflict between the decision below and *United States* v. *Graham*, 317 F.3d 262, 273-274 (D.C. Cir. 2003). In that case, the issue of whether a jury must make defendant-specific drug quantity determinations in a conspiracy case in order to set the statutory maximum sentence was neither raised nor discussed. And the question of drug quantity appears not to have been submitted to the jury at all. See *id.* at 273.

Although petitioners do not cite *United States* v. *Banuelos*, 322 F.3d 700 (9th Cir. 2003), that decision is in tension (although not actual conflict) with the decision below. In *Banuelos*, the Ninth Circuit held that, when a defendant pleads guilty to a drug conspiracy, *Apprendi* requires the district court to determine beyond a rea-

sonable doubt the quantity of drugs attributable or reasonably foreseeable to the defendant in order to subject him to the enhanced statutory penalties in 21 U.S.C. 841(b)(1). See 322 F.3d at 704.

b. Although there is a conflict between the decision below and decisions of the Fourth Circuit, this case is not an appropriate vehicle to resolve that disagreement. Petitioners would not be entitled to any relief even if the Fourth Circuit's rule were correct.

Even under the Fourth Circuit's rule, five of the petitioners did not suffer any *Apprendi* violation. Four of the petitioners—Kent Clark, Andre Lawrence, Andre Seymour, and Artrez Seymour—each had a prior felony drug conviction. See Clark Presentence Investigation Report (PSR) 10; Andre Lawrence PSR 18; Andre Seymour PSR 8; Artrez Seymour PSR 14. Those four petitioners were therefore subject to a statutory maximum penalty for their conspiracy convictions of 30 years of imprisonment, regardless of the amount of crack for which they were held accountable. See 21 U.S.C. 841(b)(1)(C). And each of those petitioners received a sentence of less than 30 years for his conspiracy conviction. See p. 8, *supra*. Petitioner Stacia Smith was subject to a 20-year statutory maximum for her conspiracy conviction, regardless of the amount of crack for which she was held accountable, see 21 U.S.C. 841(b)(1)(C), and she received a sentence of only 11 years and one month of imprisonment for that conviction. See p. 8, *supra*. Accordingly, none of those five petitioners would have a viable *Apprendi* claim even under the Fourth Circuit's rule. Cf. *United States* v. *Brooks*, 524 F.3d 549, 556 n.13 (4th Cir. 2008) (any error would be harmless where defendants were sentenced within the default

statutory maximum for drug offenses provided in 21 U.S.C. 841(b)(1)(C)).

In an effort to avoid that conclusion, petitioners argue that *Apprendi* is violated whenever a judge finds any facts "which could *theoretically* change a defendant's *potential* maximum exposure." Pet. 8 (emphasis added). In support of that proposition, petitioners cite (see Pet. 8-11) isolated statements from this Court's cases, but none of the holdings of those cases supports petitioners' argument. See *Cunningham* v. *California*, 127 S. Ct. 856 (2007) (invalidating California's determinate sentencing scheme in a case in which the judge imposed a 16-year sentence and the jury's verdict authorized a sentence of only 12 years); *United States* v. *Booker*, 543 U.S. 220, 236, 245 (2005) (invalidating mandatory federal sentencing guidelines in two cases in which the sentencing judge had imposed a sentence greater than the sentence authorized based on the jury's findings); *Blakely* v. *Washington*, 542 U.S. 296 (2004) (invalidating Washington's determinate sentencing scheme where the sentencing judge had imposed a sentence greater than the sentenced authorized by the jury's verdict alone).

Indeed, in the same cases relied on by petitioners, this Court reaffirmed that the Sixth Amendment right established by *Apprendi* is that a judge may not "*impose* a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant." *Cunningham*, 127 S. Ct. at 860 (emphasis added); see *Booker*, 543 U.S. at 245 (the "Sixth Amendment is violated by the *imposition* of an enhanced sentence under the United States Sentencing Guidelines" based on judge-found facts not found by the jury or admitted by defendant) (citation omitted;

emphasis added); see also, *e.g.*, *United States* v. *Sanchez*, 269 F.3d 1250, 1279 (11th Cir. 2001) (en banc) (no *Apprendi* violation "unless the actual sentence ultimately imposed exceeds the catchall maximum penalty in § 841(b)(1)(C)"), cert. denied, 535 U.S. 942 (2002).

Petitioner Troy Lawrence, who received a sentence of life imprisonment for his conspiracy conviction, is the only petitioner whose sentence exceeds the default statutory maximum provided by Section 841(b)(1)(C). Even he, however, would not be entitled to any reduction in his overall sentence under the Fourth Circuit's rule, because he received life sentences on five other charges. See p. 8, *supra*. Moreover, one of his life sentences was for possessing 50 grams or more of crack with intent to distribute it. Verdict 5. Although that drug transaction was not specifically detailed in the conspiracy allegations in the indictment, the evidence at trial overwhelmingly established that the transaction was part of the conspiracy. Accordingly, the jury's specific quantity finding on the crack distribution charge demonstrates that any error in failing to secure a defendant-specific drug quantity determination on the conspiracy count was harmless. See Pet. App. 21a.

Moreover, the evidence was overwhelming that all six petitioners—particularly Troy Lawrence, who was the leader of the Organization and directed its day-to-day operations—could reasonably have foreseen that the conspiracy would involve 50 grams or more of crack. See Pet. App. 19a-22a. Indeed, as the court of appeals observed, "[t]here was overwhelming evidence at trial that demonstrated the day-to-day involvement over extended periods of time of the [petitioners], such that each of them could *easily foresee* that the conspiracy involved *1.5 or more kilograms*" of crack. *Id.* at 22a

(emphasis added). Accordingly, any error in failing to secure a jury finding on the drug quantity foreseeable to each defendant was harmless beyond a reasonable doubt, and petitioners are not entitled to any relief. See *Neder* v. *United States*, 527 U.S. 1, 10-11 (1999).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 2008

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No. 07-1608

Supreme Court, U.S.
FILED
OCT 4 - 2008
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

ANDRE SEYMOUR, ET AL.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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JOINT REPLY OF PETITIONERS

INTRODUCTION

In its Brief in Opposition ("Response" or "Resp. at __"), the Government concedes that the circuit courts of appeals are split on the question of whether individual drug-conspiracy defendants are, under the Sixth Amendment, entitled to a jury finding of the quantity of drug attributable to or reasonably foreseeable by each defendant. The Government further concedes that Petitioners appropriately raise this question. (Resp. at 7-8 (conceding appropriate conviction to raise issue, timely objections and timely appeals.).) Notwithstanding these concessions, the Government contends that the Petition should be denied both because the decision below is correct and, if not, the *Apprendi* error is harmless. The Government's arguments are without merit.

Whether the Seventh Circuit's decision is correct, as the Government argues, actually supports this Court's grant of the Petition because, regardless of which position is correct, there is a conflict that only this Court can resolve. Moreover, there are two fatal flaws with the Government's harmless error argument. First, it presupposes an *Apprendi* error. Indeed, the cases upon which the Government relies to advance its harmless error argument all involve admitted *Apprendi* errors. Here, the Seventh Circuit held that there was no *Apprendi* error. Second, and more importantly, the Government's harmless error argument further highlights the conflict on this important issue of constitutional law because it ignores conflicting authority that holds that an

enhanced sentence under Section 841(b)(1) without supporting jury findings is reversible error ***even if*** the defendant's sentence does not exceed the statutory maximum of the default range. Thus, this case is appropriate for resolution by this Court.

ARGUMENT

I. THE GOVERNMENT CONCEDES THAT THE COURTS OF APPEALS DISAGREE ON THIS IMPORTANT QUESTION OF CONSTITUTIONAL LAW.

The Government concedes, as it must, that there is "disagreement among the courts of appeals," (Resp. at 15), as to whether the Sixth Amendment requires a jury to find the quantity of drug attributable to or reasonably foreseeable by each individual defendant in a drug conspiracy case before a defendant may be sentenced under an enhanced penalty range of Section 841(b)(1). The Government, however, attempts to downplay the extent of the conflict by drawing arbitrary and irrelevant factual distinctions between the cases to exclude the Second and Ninth Circuits from the conflict.[1/] A review of

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1/ The Government also takes issue with Petitioners' discussion of *United States v. Graham*, 317 F.3d 262 (D.C. Cir. 2003) (Resp. at 16; Pet. at 17 n.2) and *United States v. Nelson-Rodriguez*, 329 F.3d 12 (1st Cir. 2003) (Resp. at 12 n.1; Pet. at 18-19 n.3). However, there is no true disagreement. Petitioners explained that, while the Court of Appeals for the District of Columbia has not directly decided the question at issue, it indicated its disagreement with the conspiracy-wide approach in *Graham*. (Pet. at 17 n.2.) The Government merely points out that, as explained by Petitioners, the *Graham* court did not directly decide the question presented by this Petition. (Resp.

the cases, however, reveals that the Second and Ninth Circuits, like the Fourth Circuit, require a jury to find the quantity of drug for which an individual defendant in a drug conspiracy case is culpable beyond a reasonable doubt before that defendant may be subject to the enhanced sentencing ranges. In these circuits, the jury must find the extent of each defendant's involvement in the conspiracy consistent with this Court's mandate for conspiracy cases. *See, e.g., Pinkerton v. United States*, 328 U.S. 640, 647-48 (1946) ("A different case would arise if the substantive offense committed by one of the conspirators was not in fact done in furtherance of the conspiracy, did not fall within the scope of the unlawful project, or was merely a part of the ramifications of the plan which could not be reasonably foreseen as a necessary or natural consequence of the unlawful agreement.")

To argue that the Second Circuit is not in conflict, the Government relies on an arbitrary and irrelevant distinction between the Second Circuit cases and the Seventh Circuit's decision below. Specifically, the Government argues that, because "there was neither a jury finding nor an admission by the defendant of the amount and type of drugs involved in the conspiracy as a whole," *United States v. Gonzalez*, 420 F.3d 111 (2d Cir. 2005), and *United*

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at 16.) Likewise, Petitioners explained that, while the First Circuit was the first to formulate the conspiracy-wide approach, in *Nelson-Rodriguez* it recognized that such approach is potentially infirm under certain circumstances. (Pet. at 18-19 n.3.) The Government points out that *Nelson-Rodriguez* did not overrule *United States v. Derman*, 298 F.3d 34 (1st Cir. 2002), though Petitioners did not contend that it did. (Resp. at 12 n.1.)

States v. Adams, 448 F.3d 492 (2d Cir. 2006), are not in conflict with the Seventh Circuit's decision, where the jury made a conspiracy-wide drug quantity finding. (Resp. at 16.) Contrary to the Government's assertion, the Second Circuit ***unequivocally*** requires a jury finding of drug quantity as to each defendant in a drug conspiracy beyond a reasonable doubt, if not admitted by the defendant, to sentence the defendant under an enhanced range of Section 841. *See Adams*, 448 F.3d at 500 ("We have held that a Section 846 conspiracy involving any of the enhancement-penalty provisions of Section 841(b)(1) includes the additional element of quantity. It also includes ***the requirement that a co-conspirator defendant at least could have reasonably foreseen the type and quantity of the substance about which she conspired.***") (emphasis added); *Gonzalez*, 420 F.3d at 125-28 ("[the defendant] could not be convicted of the charged § 841(b)(1)(A) conspiracy, or sentenced pursuant to the increased penalty ranges provided in that subsection, unless a jury found or [defendant] himself admitted the specified drug quantity element"); .

Similarly, the Government attempts to downplay the significance of Ninth Circuit precedent by arguing that it is only "in tension," but not "actual conflict," with the conspiracy-wide approach. (Resp. at 16-17.) Again, the Government draws the arbitrary factual distinction that the *Apprendi* error in *United States v. Banuelos*, 322 F.3d 700 (9th Cir. 2003), involved only a guilty plea. (*Id.*) In so arguing, the Government ignores the *Banuelos* court's unequivocal statements against a conspiracy-wide approach to drug conspiracy sentencing:

> [T]he very finding of an *Apprendi* violation means that it was improper for the district court to determine drug quantity attributable to [the defendant] at sentencing without first informing [the defendant] ***of his right to a jury determination of drug quantity attributable to him beyond a reasonable doubt.*** The record reflects that the district court did not so advise [the defendant] and that [the defendant] did not explicitly waive ***his right to a jury determination of drug quantity attributable to him.***

322 F.3d at 706 n.4 (internal citation omitted) (emphasis added). Thus, the Ninth Circuit's decision in *Banuelos* leaves no doubt that it requires defendant-specific findings of drug quantity in drug conspiracy cases. Accordingly, the Second and Ninth Circuits, like the Fourth Circuit (which the Government concedes does not allow conspiracy-wide findings), hold that the conspiracy-wide approach that the Seventh Circuit followed below violates the Sixth Amendment.

II. THE GOVERNMENT'S POSITION ON HOW THE CONFLICT SHOULD BE RESOLVED SUPPORTS THIS COURT'S GRANT OF THE PETITION.

The Government spends a considerable portion of its Response arguing that this Court can reject the Petition because the conspiracy-wide approach the Seventh Circuit applied here is constitutional and

that the *Collins* decision and subsequent Fourth Circuit decisions requiring defendant specific jury findings are incorrect. (*See, e.g.*, Resp. at 10 (the Seventh Circuit "correctly held that the statutory maximum sentence under Section 841(b) is determined by a jury's finding of the amount of drugs involved in the conspiracy as a whole"); Resp. at 11; Resp. at 12 (defendant-specific findings are "contrary to the plain language of the drug statutes"); Resp. at 13-14; Resp. at 15 ("The ruling in *Collins* is incorrect.")). The Government's argument is, at best, circular because the constitutionality of the conspiracy-wide approach is the very question that the Petition presents. Indeed, the Government's challenges to the Fourth Circuit's reasoning for requiring defendant-specific drug quantity findings highlights the need for this Court's intervention. Though the conspiracy-wide precedent existed, the Fourth Circuit expressly held that this Court's decision in *Apprendi* required its departure from the conspiracy-wide approach, which the Fourth Circuit itself had applied prior to *Apprendi*. *Collins*, 415 F.3d at 314 (*Apprendi* "altered [our previous] holding by effectively replacing the words 'a district court' with 'the jury,' and requiring proof beyond a reasonable doubt").

Moreover, to support its position, the Government does little more than summarize the holdings of the cases that adopted the conspiracy-wide approach and this Court's precedent in *Edwards v. United States*, 523 U.S. 511 (1998).[2/]

2/ The Government's reliance on this Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002) is misplaced. (Resp. at 14-

(Resp. at 11-14.) The Government fails to respond to Petitioners' explanation of why *Edwards*, which is a pre-*Apprendi* decision that relied exclusively on the power provided under the Sentencing Guidelines, was an inapposite source of authority for the First Circuit to invoke to formulate the conspiracy-wide approach in *United States v. Derman*, 298 F.3d 34 (1st Cir. 2002). (Pet. at 17-21.)

III. THE GOVERNMENT'S HARMLESS ERROR ARGUMENT FURTHER HIGHLIGHTS THE CONFLICT.

The gravamen of the Government's Response is its incorrect contention that "any error in failing to secure a jury finding on the drug quantity foreseeable to each defendant was harmless beyond a reasonable doubt," (Resp. at 20), because, even though Petitioners were sentenced under the enhanced range of Section 841(b)(1)(A), their actual

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15.) The Government incorrectly cites *Cotton* as indicia that the conspiracy-wide approach is constitutional. (Resp. at 14-15.) However, the Court in *Cotton* was not addressing whether a jury's drug quantity finding for the conspiracy as a whole is sufficient to sentence every convicted co-conspirator under the same sentencing range of Section 841(b)(1). The *Cotton* Court was considering whether the omission of a fact that enhances the statutory maximum sentence, drug quantity, from a federal indictment justifies a court of appeals' vacating the enhanced sentence, ***even though the defendant did not object in the trial court.*** 535 U.S. at 627 (emphasis added). The parties in *Cotton* conceded that there was an *Apprendi* error in failing to include drug quantity in the indictment and the Court was solely applying the plain-error test to the court of appeals' entertainment of the issue even though it was not raised at the trial court. *Id.* at 632.

sentences did not exceed the default maximum sentence under Section 841(b)(1)(C) (excluding Troy Lawrence).[3/] (Resp. at 17-19.)

The Second Circuit's 2005 decision in *Gonzalez* deals a fatal blow to the Government's harmless error argument. *Gonzalez* involved a co-conspirator defendant who pleaded guilty to an unspecified amount of crack, but was nevertheless sentenced under Section 841(b)(1)(A) after a judge determined the quantity of drug by a preponderance of the evidence. 420 F.3d at 116-18. The defendant received a sentence of 20 years – his mandatory minimum sentence under Section 841(b)(1)(A) after accounting for a prior felony conviction – which he could have also received for an unspecified amount of

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3/ It is axiomatic that, for an error to be harmless, there must be a predicate error. The Seventh Circuit held below, however, that there was no *Apprendi* error. In the cases cited by the Government (Resp. at 14, 20), the district courts' errors were conceded. *See Cotton*, 535 U.S. at 632 ("The Government concedes that the indictment's failure to allege a fact, drug quantity, that increased the statutory maximum sentence rendered respondents' enhanced sentences erroneous under the reasoning of *Apprendi* and *Jones*."); *Neder v. United States*, 527 U.S. 1, 4 (1999) ("It is agreed that the District Court erred in refusing to submit the issue of materiality to the jury with respect to those charges involving tax fraud."). Though neither case has any application to this case, as *Cotton* involved only the application of the plain-error test to a court of appeals' decision to entertain an issue that was not raised at the trial court, (*see supra* note 2), and *Neder* involved the applicability of harmless error to an erroneous jury instruction that omitted an element of the offense, 527 U.S. at 4, they are perhaps most distinguishable because they contained conceded errors. Unlike *Cotton* and *Neder*, whether there was an *Apprendi* error is the constitutional question before this Court.

drug under Section 841(b)(1)(C). *Id.* at 115. In allowing the defendant to withdraw his guilty plea even though his sentence did not exceed the maximum under the default range of Section 841(b)(1)(C), the court recognized the disingenuous nature of the argument the Government currently advances in light of the fact that, under Section 841, the mandatory minimum and maximum sentences simultaneously change under each subsection:

> when drug quantity raises a mandatory minimum sentence under § 841, it simultaneously raises a corresponding maximum, thereby increasing a defendant's authorized sentencing range above what it would have been if he had been convicted of an identical unquantified drug crime ... It would turn [*Apprendi*] on its head to conclude that a fact, such as drug quantity, which unquestionably increases the 'range of penalties to which a criminal defendant is exposed,' is not an element of the crime that must be pleaded and proved beyond a reasonable doubt (or admitted by the defendant) because it increases the mandatory minimum as well as the maximum.

420 F.3d at 126-27. Thus, the court ruled that unless a jury finds the drug quantity attributable to a defendant beyond a reasonable doubt, or the defendant admits a drug quantity, a harmful *Apprendi* violation occurs if a defendant is sentenced under the aggravated offenses in Sections 841(b)(1)(A) or (B), even if the actual sentence does

not exceed the statutory maximum for the non-aggravated offense in Section 841(b)(1)(C). *Id.* at 129.

The *Gonzalez* court reconciled its holding with this Court's holding in *Harris v. United States*, 536 U.S. 545 (2002), which held that *Apprendi* does not apply to statutory minimum sentences, by explaining that Section 841, unlike 18 U.S.C. § 924(c)(1)(A) at issue in *Harris*, does not use a fact simply to identify increasing minimum sentences within a penalty scheme with a fixed maximum. 420 F.3d at 126-27. Rather, under Section 841, the mandatory minimum sentences and the maximum sentences change simultaneously. *Id.* The court stressed that, "*Harris* simply does not speak to that circumstance. It holds that, where a fact 'alter[s] only the minimum' sentence, without 'authoriz[ing] the judge to impose [a] ... higher penalt[y],' the Constitution permits the fact to be treated as a sentencing factor." *Id.* The Government does not even attempt to rebut Petitioners' demonstration that because of Section 841's sentencing scheme that has graduated minimum and maximum sentences, the Government's harmless error argument necessarily creates a zero-to-life sentencing range for any defendant convicted of participating, to any extent, in a drug conspiracy involving more than 50 grams of crack. (Pet. at 24.)

Similarly, the Sixth Circuit recently found plain error and reversed a defendant's sentence where the defendant was sentenced according to a mistaken enhanced statutory maximum, even though the defendant's sentence did not exceed the correct

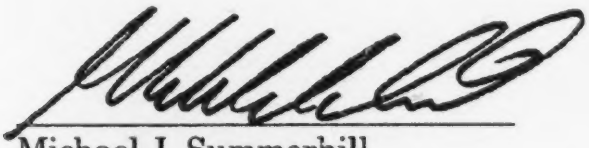
statutory maximum. In *United States v. Watson*, 476 F.3d 1020 (6th Cir. 2007), the defendant was convicted of being a felon in possession of a firearm in violation of 18 U.S.C. § 924(a)(2). The district court judge mistakenly believed that the defendant's statutory maximum sentence was 240 months, though the statutory maximum sentence was actually 120 months, and sentenced the defendant to 108 months. *Id.* at 1023-24. In finding plain error even though the defendant's actual sentence did not exceed the correct statutory maximum, the Sixth Circuit concluded that "the district court's erroneous premise gave it the mistaken impression it was being lenient and the error thus infected [the defendant's] sentence." *Id.* at 1024 (citation omitted).

Here, assuming an *Apprendi* error, the Government cannot establish beyond a reasonable doubt that Petitioners were not harmed when the district court sentenced them with the "erroneous premise" that the enhanced minimum and maximum sentences of Section 841(b)(1)(A) governed their sentences. Indeed, when sentencing some of the Petitioners, Judge Andersen of the Northern District of Illinois made comments similar to those of the district court judge in *Watson*, *i.e.*, that he thought he was imposing a sentence "considerably less" than the maximum. *See Watson*, 476 F.3d at 1024.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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